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CURRENT EVENTS.

THE MEASURE OF PUNISHMENT.—We took occasion about two months ago[1] to comment upon the gross abuses of discretion sometimes committed by judicial officers in fixing the measure of punishment which they award to offenders. In many of our States, the duty of fixing the precise measure of punishment between the maximum and the minimum prescribed by the statute is committed to the jury; in others, and especially in minor offenses, that duty devolves upon the court. By both courts and juries gross injustice is often done, especially in cases in which the legislature has failed to discharge *its* duty, and left to the tribunals too broad or too indefinite a margin.

In England, it would seem, abuses of power in this respect are more common and more flagrant than with us. The *London Law Times* calls attention to some gross *indiscretions* of a judge in affixing penalties to offenses. It says:

"We are not surprised to see some comments in the press on the sentences inflicted by Mr. Justice Day. Eighteen months' imprisonment of a clergyman for marrying a person who was under age without due publication of banns, penal servitude for life on a boy for attempting to extort money by threats of false accusation, and eighteen months' imprisonment of the young man called Rowden, or Rawden, for falsely publishing in a newspaper that he was engaged to marry a young lady of high rank, are really a group of sentences which must excite amazement in the ordinary mind. Indeed, when we compare them with the punishments often awarded by judges for offenses complicated with violence, they would appear to be eccentric and passed with a view to invite the interference of the Home Secretary."

While it appears that, in England, there is in this respect a greater need of reform than with us, it is nevertheless true that the criminal codes of most of the States could be improved by a careful revision, with the view of limiting the undue exercise, in this particular, of judicial discretion.

[1] 24 Cent. L. J. 25.

SUGGESTED LEGISLATION.—Advice gratis is, of course, very cheap, but it does not follow that it is for that reason necessarily worthless. On the contrary. it very often happens that valuable suggestions emanate from persons who are under no sort of obligation to furnish them.

We are led into this line of remarks by observing in the *Virginia Law Journal* for March a suggestion to the legislature of that State that it would do well to follow the example of Rhode Island in requiring that the windows of saloons licensed to sell intoxicating liquors to be drunk upon the premises, should be unobstructed "during the entire day of each Snnday," so that passers-by may have a clear view of the interior of the premises. The Rhode Island statute to this effect has, it seems, stood the test of the supreme court of that State, and has been pronounced constitutional and valid.

At the risk of being regarded as fanatical and an opponent of what is miscalled "personal liberty," we venture to add the suggestion that, on week-days as well as Sundays, the same rule should be adopted and enforced, and that the tapster be required to ply his vocation in the full light of day. We do not see why any objection should be made or could be sustained. The right to retail intoxicants is a privilege, a franchise; all States require the payment of a license, high or low, and we do not see why those who enjoy the franchise, who are willing and anxious to secure it by the payment of a considerable sum of money, who, in some places, as in this city, absolutely electioneer for it by getting the signatures of their neighbors to their petitions, should object to exercising its functions in the view of as many of their fellow-citizens as may choose to witness the spectacle. Such a condition to every dramshop license issued, if it had no other beneficial effect, would tend to lessen the practice of drinking among the young, and keep boys and young men out of the places in which so many of them begin to acquire habits that ultimately lead them to their ruin.

On the questions of prohibition, of high

license or low license, we have nothing to say. It is not within the province of such a journal as this, but we feel ourselves fully warranted in suggesting and supporting any proposition that would tend even slightly and indirectly to prevent the youth of the country from forming habits which everybody agrees are degrading and destructive.

NOTES OF RECENT DECISIONS.

CRIMINAL PRACTICE—INDICTMENT—EMBEZZLEMENT — NATIONAL BANKS.—We are indebted to a correspondent for an early copy of an important opinion of the Supreme Court of the United States, delivered by Mr. Justice Matthews, in a case[1] involving some interesting questions of criminal pleading and procedure. It seems that Northway was indicted in the Circuit Court of the United States for the Northern District of Ohio for embezzlement, alleged to have been committed by him as "president and agent" of a National Banking Association. There was a general demurrer to a number of the counts of the indictment, and the circuit court, upon hearing and consideration thereof, certified to the Supreme Court of the United States no less than *six* questions upon which the judges were divided and opposed in opinion. The supreme court unanimously answered each of these questions in a sense favorable to the validity of the indictment.

The first question was, whether any of the counts in the indictment charged the defendant with an offense under the laws of the United States.

This question the supreme court declined to answer, because it was too vague and indefinite, and because the circuit court was not authorized to certify it under the act of congress providing for such certification.

The second question was, whether charging the defendant with committing the offense, "as president and agent, did not vitiate said counts of said indictment."

To this the supreme court replies, in effect, that the charge so stated does not vitiate the indictment, because, if the defendant committed the offense at all, he committed it as "president and agent," and not otherwise.

The third question was, whether it was necessary to charge that the funds alleged to have been embezzled had been previously intrusted to the defendant.

This question the supreme court answers in the negative, because, from the general powers of his office, he could commit the offense, although the specific funds had not been especially intrusted to him; that, "in order to misapply the funds of the bank, it was not necessary that the officer charged should be in actual possession of them by virtue of a trust committed to him."

The fourth question was, whether it was necessary, in charging defendant with aiding and abetting Fuller, the cashier, in *his* misapplication of the funds of the bank, to charge that he (Northway) knew that Fuller was cashier.

This the court answers in the negative. The *scienter*, it asserts, is sufficiently stated. "Both are alleged to be officers of the same corporation. The knowledge that each had of the official relation of the other is necessarily implied in the co-existence of this official relation on the part of both towards the same corporation."

The fifth question impugns the sufficiency of the indictment in describing the offense charged, and the sixth, the adequacy of the description in that instrument, of the bank as a national bank.

Both are quite summarily disposed of by the supreme court, which holds the indictment amply sufficient.

We took occasion, some months ago,[2] to comment upon the remarkable fragility of indictments, and the fact that their fracture and demolition seems to be so generally regarded as a visitation of Providence, neither their authors nor anybody else being held responsible to public opinion for the miscarriage of justice which their quashing occasions.

The case under consideration presents the other side of the picture. The indictment seems to have been absolutely ironclad, and nothing short of preternatural caution on the part of the trial court could have permitted the case to go to the appellate court on the skirmish line of a demurrer or

[1] United States v. Northway, U. S. S.C., Feb. 7, 1887.

[2] 23 Cent. J. J. 529.

interlocutory order, or a certificate of division of opinion.

We learn from the newspapers that this case, having attracted much attention, especially in the section of the country in which the defalcation and embezzelement are alleged to have occurred, the author of the indictment, Emerson H. Eggleston, Esq., late United States District Attorney for the Northern District of Ohio, has been much censured for the alleged imperfection of his production. The opinion of the Supreme Court of the United States is, of course, a complete vindicatian of the draughtman.

The opinion of the supreme court in this case suggests several points worthy, in our opinion, of serious consideration. One is that, although in this case the indictment proved to be immaculate and its author blameless, it often happens in criminal courts generally that the prosecuting officer *is* careless, and his indictments are imperfect and insufficient. The consequence is not unfrequently a failure of justice, and it is the duty of the court to check and alleviate, and of the legislature to remedy this evil.

This case calls up also what we think is a capital imperfection in the constitution and jurisdiction of the circuit courts of the United States. Why should the judges of those courts be permitted to send up cases to the supreme court upon certificate of division and opposition of opinion, when the matter involved is merely a question of pleading or procedure, and the decision, if they had rendered any, would have been interlocutory, not final?

It is a general rule that an appeal cannot be taken, nor can a writ of error be sued out until after a final judgment has been rendered; and why should the *no-decsion* of a certificate of division and opposition of opinion operate as an appeal and carry a case to the appellate court, not only before a final judgment, but before any ruling or judgment whatever, great or small? And why should a circuit court of the United States be ordinarily composed of *two* judges instead of one, or three, or five, so as to have an odd number and always secure a decision?

We think that, in this respect, as in some others, the subordinate courts of the United States would well bear reconstruction, and that the subject is worthy of the consideration of congressional judiciary committees.

WHO ARE "PASSENGERS?"

Two rules at least, in the law of carriers of persons, are so well known that it is needless to cite cases to support them, viz.: that a carrier of passengers, unlike a carrier of goods, is not an insurer, but is simply held to the use of extraordinary care, and that even this responsibility extends not to strangers. Who, then, are "passengers," and entitled to claim of the carrier the protection and the diligence and care which, for good reasons the law gives them, presents, in the every-day transactions of railroad and steamboat travel, an interesting and frequent question.

First, among the varied and mixed crew which every ship and train carries, comes the "stowaway," or the tramp stealing a ride in the car or on the platform, and ejected by the conductor when and as often as he is discovered. He, it is evident, is not a passenger.[1] Much more respectable than this individual, but according to the courts entitled to no more protection at the hands of the carrier, is one who rides free on the train by the grace of the conductor or other servant on the train, but in violation of the rules of the company. In Eaton v. Delaware R. Co.,[2] the plaintiff was invited by the conductor of a coal train to ride with him, the conductor telling him that he would get him a place as brakeman. No fare was asked or paid, and there was a rule of the company forbiddiug passengers to ride on coal trains. There was a collision in which the plaintiff was injured, but it was held that he was not a passenger and could not recover damages of the railroad. In a Texas case,[3] a similar conclusion was reached on almost the same state of facts. A person was riding on a freight train with the conductor's consent, but against the rules of the carrier, known to him. He paid no fare, and, while so on the train, was injured. "Appellant," "said the court," as a railway company is a common carrier of both freight and passengers; but

[1] Thomp. Carr. Pass. 43.
[2] 57 N. Y. 382.
[3] Houston R. Co. v. Moore, 49 Tex. 31.

has unquestionably the right to make reasonable regulations for conducting its business; and parties dealing with it must conform to such regulations. That a regulation of a railway company, that freight and passengers will be carried on its road in separate trains, is a reasonable regulation, can hardly be doubted by any one. Indeed, it seems a highly salutary regulation for the public as well as the company. Nor can it be controverted when a railroad company makes other suitable provision for passenger travel, that no one has the right to demand that he shall be allowed to ride in its trains devoted exclusively to the carrying of freight. If a party in violation of such regulation and without the consent of the company, forces himself into one of its freight trains, it surely cannot be supposed that the company could be held responsible for him in its character as a carrier of passengers; or that the party who should thus contribute to the injury which he might sustain while thus wrongfully in the train may maintain an action against the company for such injury. Unless he could, an action cannot be maintained under the statute by his heirs, representatives and relatives in case of his death. It may be true, where a railroad company habitually permits passengers to travel on its freight trains, notwithstanding it may, by regulation, prohibit it, that the company will incur the same responsibility to such passengers as if they were on the regular passenger cars. But when it is shown that the regulations of the company absolutely forbid passengers riding on freight trains, and where there are no cars attached to such trains except those ordinarily accompanying trains exclusively for freight, or such as by their appearance and manner in which they are fitted up, could not be properly regarded as inviting passengers into the train, the burden of proving that the party injured was justified in going upon such train as a passenger, properly devolves upon those who sue for damages resulting from injuries sustained by him while on such train. Do the facts in this case show that appellant permitted passengers to travel on its freight trains, notwithstanding its regulation prohibiting it, to an extent or in a manner to warrant the deceased in supposing that he was authorized to get upon its freight train as a passenger? Certainly they do not. If, then, it can be inferred that the deceased was properly on the train, it must be upon the supposition that he had a special permit; or that the conductor of the train was authorized to annul or waive the regulation of the company prohibiting passengers from traveling in freight trains. But the evidence shows that the conductor had no such authority, and that the deceased must have known that he had not."

In a Maine case,[4] one who was injured while riding on a hand car by invitation of a section foreman, was held to have no cause of action against the railroad, in the absence of proof that it was accustomed to carry passengers upon hand cars. In a Texas case,[5] a negro gave the fireman fifty cents to let him ride on the pilot of the locomotive, and while so riding (against the rules) was injured by collision with a hand car. It was held that the railway company was not liable.[6]

In a New York case, the plaintiff, after crossing on the ferry boat of the defendant, paying therefor the usual fare, instead of leaving the boat remained on board and returned, paying no more fare. On entering the ferry slip she received an injury through the negligence of defendant's agents. It was held that she might recover.[7] In a Missouri case, an infant rode upon a freight car in a freight train, without the consent of his parents, and without the knowledge of the conductor, and without paying fare. The rules of the company prohibited the carrying of passengers without fare, or on freight trains except in the caboose. The conductor knowingly suffered him to remain on the freight car. The brakeman without authority set him at a dangerous service on the car, in trying to perform which he was injured. The company was held not liable.[8] So in a Connecticut case. Here the plaintiff, desiring to have his horse transported by defendant's railroad, induced A, who had several horses to go by the same train, to include his and have it billed as A's. It was the defendant's rule that only one person could go free with

[4] Hoar v. Maine Cent. R. Co., 70 Me. 65.
[5] Rucker v. R. Co., 61 Tex. 497; Chicago, etc. R. Co. v. Michie, 83 Ill. 427.
[6] Rucker v. R. Co., 61 Tex. 499.
[7] Doran v. Ferry Co., 3 Lans. 105.
[8] Sherman v. R. Co., 72 Mo. 62; 37 Am. Rep. 423.

stock, and when A told the conductor there might be another person to accompany him, he replied that he would have to pay fare. The defendant had no knowledge of the plaintiff's intention to go on the train. The plaintiff got no ticket but intended to pay his fare on the train. Before he could pay there was a collision by the defendant's negligence and he was injured. The court held, that he could not recover.[9] Other cases in other courts sustain these conclusions.[10]

On the other hand, in Dunn v. Grand Trunk R. Co.,[11] a person was riding on a freight train, contrary to the rules of the company, but with the consent of the conductor, who collected fare from him. The company was held liable to him as a passenger for injuries. In a Massachusetts case,[12] it was held that the fact that a carrier's servant violates his duty and instructions and invites a person to ride in a dangerous place, and without paying fare, does not take away his rights as a passenger, in the absence of collusion on his part with the servant to defraud the carrier. So one who by mistake gets on a passenger train other than the one he intended to take passage upon, is nevertheless a passenger upon the train he is on, and the relation of passenger and carrier exists between him and the company.[13]

In Toledo, etc. R. Co. v. Beggs,[14] the plaintiff when injured was riding on a pass, non-transferrable, issued to another, passing himself off to the conductor as such person. He was held not a passenger. In an Iowa case,[15] the plaintiff was traveling on a non-transferrable commutation ticket issued to another person. He, too, was held not a passenger. "When the decedent," said Adams, J., "presented the ticket, we must presume that he intended to be understood as claiming that he had a right to travel upon it. This claim involved the claim that he was Forgrave, for the ticket showed upon its face that no one had a right to travel upon it but Forgrave. But by the presentation of the ticket the decedent falsely personated Forgrave with the intention of deceiving the company; and he did deceive it and to its injury; for, by reason of the deception, he escape the payment of the full rate with which he was otherwise chargeable. It is not material then that the decedent obtained the conductor's consent. Whether his consent would have bound the company if he had known that the decedent was not Forgrave we need not inquire; it certainly did not under the circumstances shown. The only relation existing between the decedent and the company having been induced by fraud, he cannot be allowed to set up that relation against the company as a basis of recovery. He was then at the time of the injury in the car, without the rights of a passenger and without the right to be there at all. We do not say that it is necessary that a person should pay fare to be entitled to the right of a passenger. It is sufficient, probably, if he has the consent of the company fairly obtained. But no one would claim that a mere trespasser has such rights; and it appears to us to be well settled that consent obtained by fraud is equally unavailing."

One who, instead of concealing himself, openly refuses to pay fare, is not, under such circumstances, a passenger. In Higley v. Gilmer,[16] the court say: "Who is a passenger"? A passenger is a person who undertakes, with consent of the carrier, to travel in the conveyance provided by the latter, otherwise than in the service of the carrier as such. Any fact indicating on the one side an offer to carry or to be carried, and on the other side an acceptance of such offer or request, are sufficient. * * * The question whether one is a passenger or not, is one of mixed law and fact, but the law being tolerably clear, it may be said, as a general rule, that the issue upon any conflict of evidence is one for a jury to decide and not one to be passed upon as a matter of law by the court.[17] While it is the duty of a common carrier of passengers to carry any person who may apply for passage, if he be a suitable person and the carrier has sufficient room in his conveyance, it is nevertheless true that this obligation is subject to the

[9] Gardner v. R. Co., 51 Conn. 143; 50 Am. Rep. 12.

[10] See Toledo, etc. R. Co. v. Brooks, 81 Ill. 245; Washburn v. R. Co., 3 Head, 638; Brown v. R. Co., 64 Mo. 536; Austin v. R. Co., 8 B. & S. 327; The Lion, L. R. 2 Adm. 102.

[11] 58 Me. 187.

[12] Wilton v. Middlesex R. Co., 107 Mass. 108.

[13] Columbus, etc. R. Co. v. Powell, 40 Ind. 37.

[14] 85 Ill. 80.

[15] Way v. Chicago, etc. R. Co., 64 Iowa, 48. But see Great North. R. Co. v. Harrison, 12 C. B. 576.

[16] 3 Mont. 90.

[17] Shearm. & Redf. on Neg. p. 305-6, § 262.

qualification, that the regular fare be paid or tendered.[18] Before a person can become a passenger he must offer to become one, and this offer must be accepted by the carrier, and unless the fare is waived it must be paid or tendered. Many cases treat the relation of carriers as formed by contract. Now, if a person proposes to become a passenger, and yet refuses to pay his fare, whereupon the carrier refuses to undertake to carry him, how can there be said to be a contract of carriage between them? There is no mutuality in such a contract. The minds of the parties do not meet. Again, consider that the duties of a carrier are fixed by law and not by contract, then these duties are not required to be performed, unless the person who demands their fulfillment pays his fare or tenders to pay the same or the payment is waived. Until that requirement is complied with the carrier does not undertake to perform the duty of carrying him. Many cases might be cited to show that when a person enters into the conveyance of a common carrier of passengers, and if it is demanded, refuses to pay the regular fare, he can be expelled therefrom by force. These cases are based upon the view that such a person has no right in the conveyance of such carrier; that in fact he is a trespasser there. If a person with great assurance enters a railroad car and takes the best seat therein and refuses to pay his fare when demanded, is he any less a trespasser than some poor timid boy who gets upon a train and hides under the seats or in some nook in a baggage car without any intention of paying any fare? If so, I am unable to perceive it. If the person I have named upon the refusal to pay his fare should be ordered to leave the car and be given due opportunity therefor, but should refuse flatly to go, and the conductor should not deem it prudent to attempt to expel him on account of his known strength and fierce passions, I should think it would tax to its utmost the ingenuity of even so learned and competent an author as Mr. Wharton to find that the railroad company had consented to his becoming a passenger on their conveyance."

Are persons whose object in being in the carrier's vehicles is not carriage but trade passengers? In Yeomans v. Contra Costa Steam Co.,[19] one who leased a bar room on a steamboat, for the purpose of selling liquor and cigars to the passengers, paying a monthly rent but no passage money, was held entitled to all the rights of a passenger. In Conn. v. Vermont R. Co.,[20] the railroad, in consideration of the payment of a certain sum of money and his agreement to supply the passengers with ice water, issued to a person a season ticket over its road and permitted him to sell popped corn on the trains. It was held that he was a passenger. "It appears' said the court "that the selling of corn to the passengers in the trains had been his regular business for a long time, and that in order to follow that business he held a season ticket, renewed every quarter, and was a traveler over the road substantially every day. It appears to us that in this state of facts he must be considered as a passenger, within the meaning of the statute. It certainly can make no difference that his object in traveling was to sell his merchandise while in the act of traveling, and that he had no other purpose in going over the road. Like other season ticket holders, he paid the defendants for the privilege of passing and repassing regularly over the road, and was at liberty to go or not as he pleased. It appears to us that the services which he rendered, in furnishing water to passengers, were intended as a compensation for some increase in his privileges. The fact remain that he was traveling on his own business and not on that of the defendants."

And in quite a number of cases a government mail agent paying no fare but on the train to attend to the mails under an arrangement between the government and the railroad,[21] and an express messenger under similar circumstances have been held to be passengers,[22] and the same is held of persons employed on or in charge of a private car which is attached to and being drawn by a railroad company. They are entitled to the rights of a passenger of the railroad.[23] In Union Pacific R. Co. v.

[18] Ang. on Carriers (Lathrop's ed.), p. 437, § 525.

[19] 44 Cal. 71.

[20] 108 Mass. 7.

[21] Hammond v. R. Co., 6 S. C. 130; Nolton v. R. Co., 15 N. Y. 444; Seybolt v. R. Co., 95 N. Y. 562. *Contra:* Penn. R. Co. v. Price, 96 Pa. St. 256.

[22] Blair v. Erie R. Co., 66 N. Y. 313.

[23] Lockhart v. Lechtenthaler, 46 Pa. St. 151; Lackawanna R. Co. v. Chenowith, 52 Pa. St. 382; Cumberland Valley R. Co. v. Meyer, 55 Pa. St. 288.

Nichols,[24] an express company by contract with the defendant had the use of a car for its agent. The latter, without the authority of his employers, took the plaintiff with him to teach him the business, and the conductor, thinking him an employee of the express company, collected no fare from him. It was held that he was not a passenger. Said the court: "So far as the argument or the decision of this case is concerned, it will be admitted that all the rulings of the court below were correct if the plaintiff had been a passenger within the true sense of that term. Also that a regular express messenger is a passenger, entitled to receive the same care as any other passenger, so far as the same can be exercised toward him, although nothing be paid for his transportation except what the express company pays to the railroad company for transportation generally of their freight and agents. Also that any person may be a passenger, entitled to all the rights and privileges of other passengers, without the payment of any fare, if he be on the train with the intention of being a passenger and with the consent of the company or its officer, provided said consent be obtained without any fraud, or provided said company or its officers have a full knowledge of all the facts. Also that a regular passenger may be allowed by the conductor the privilege of walking through the cars, or getting on the platform, or into the baggage car, without forfeiting any of his rights as a passenger. And also, that the obligations of common carriers of passengers do not rest wholly or even mainly upon contract, but principally upon the laws of the State in which such carriers do business. But it will not be admitted that any and every person who may enter a car or go upon a train is a passenger, or entitled to all the rights and privileges of a passenger. * * It is probably true that the obligation of a common carrier of persons does not rest wholly or even mainly upon contract, but still no person can become a passenger except by a contract, either express or implied. A passenger is a person who undertakes, with the consent of the carrier, to travel in the conveyance provided by the latter, other than in the service of the carrier as such. Shear. and Redf. on Neg. 292, § 262. It is true that, whenever a person who desires to become a passenger on a railroad does all that the law and the rules of the company require of him for that purpose, it will be presumed that the company has given its consent, and that the requisite contract has been made; for in such a case the company could not legally withhold its consent. But whenever it is shown that such person has not done what is required of him, no contract will be presumed. It will then devolve upon such person to show affirmatively that a contract has been made—to show affirmatively that the consent of the company has been given. In the present case, the plaintiff did not do what was required of him, in order that he might become a passenger; he did not himself make a contract with the railway company, or any of its agents; and he had no right to ride under the contract made between the express company and the railway company. The consent obtained from the conductor was the consent that an express messenger might ride in the baggage car and without paying his fare. Such consent did not apply to the plaintiff. But if it be said that the conductor applied it to the plaintiff, then it may be answered that it was so done under a misapprehension, induced by the plaintiff himself, in allowing himself to be introduced to the conductor as an express messenger and represented to be such messenger. This was a legal fraud upon the conductor and upon the railway company, whatever may have been the intentions of the plaintiff. There was but little conflict in the evidence in this case —none upon the points we have been discussing. Therefore, whether the plaintiff was a passenger or not was purely a question of law. If he was a passenger he was undoubtedly entitled to recover, for the railway company was unquestionably guilty of some negligence in allowing the track of the railway to get out of repair. Whether he was a passenger or not seems to have been considered by the court below as resting almost exclusively upon the moral intentions of the plaintiff. If the plaintiff honestly believed that he did right in doing as he did, or if he honestly believed that the circumstances of the case gave him the right to do as he did, then, according to the the view of the court below, he was a passenger. But, on the other hand, if he knowingly practiced a fraud and deception

[24] 8 Kan. 505.

upon the conductor, whereby he was allowed to ride in the baggage car without the payment of fare, he was not a passenger. This theory seems to have run through the whole charge of the court, and the whole case seems to have turned upon it. The court below therefore erred in its charge in some of the instructions that it refused."

A boy who boards a train, though with the consent of the conductor, to sell newspapers to the passengers, is not a passenger.[25]

An employee of the carrier, traveling on his employer's conveyance on his own (the employer's) business, is a passenger.[26] But a servant of the carrier, riding on his master's business on his master's conveyance, though not in charge of or necessary to the running of the conveyance, is a servant and not a passenger. In several cases the plaintiff was an employee of the carrier, and while riding free on the gravel train to his work was injured. It was held that he was not a passenger.[27] But in another case the plaintiff was a journeyman carpenter, in the employ of a railroad company, and was engaged in repairing a bridge about fifteen miles from where the plaintiff lived. The accident by which he was injured occurred while he was returning from his work to his home on a train at night. The plaintiff was not hired to pursue his work on the train, but was carried in consideration of a reduction in the price of his wages. When his day's work was done he was no longer in the service of the company, but was free to go or stay; and when he traveled he, in effect, paid his fare out of his wages, for he was hired at a less price per day than if he had paid his fare in money. It was held that while so traveling to and from his work he was a passenger.[28]

It is not necessary that a person should be on the carrier's vehicle in order to be regarded as a passenger. As a passenger it is said, in an Indiana case, he has the right to stand or walk on the platform, provided at stations for the convenience of passengers while the train is stopping for refreshments, and in a street alongside of the track and platform; and the servants of the railroad company are bound to exercise the care of a reasonable and prudent man in the discharge of their duties on said platform and street, and have no right to throw sticks of wood from the train upon such platform or street, without first ascertaining whether such action would endanger any passenger standing or walking there.[29] He may be temporarily absent from the conveyance,[30] as, for example, on the platform of a refreshment station,[31] or walking from one conveyance to another.[32] In a Maine case, it is said:[33] "When a train stops at one of its stations to discharge and receive passengers belonging to that particular station, the company is bound to see that proper modes of egress and ingress are provided for such passengers. But the other passengers may leave the cars, unless notified not to do so; but it must, to a certain extent, be at their own risk, so far as the usual modes of egress and ingress are in question. And the same rule applies more strongly where a train stops on a side track, awaiting the passing of another train out of time. In such a case, the duty and the safety of the passengers both concur in saying to those who are not destined for that station, that they should remain in the car. That is the place of safety. The uncertainty as to the time when the other train may pass, and as to the rate of speed and the danger in standing on or near the track, or in passing across it, are all suggestive of risk, and of the necessity of great care and caution to avoid injury. If, however, no objection being made, or notice given, a passenger, who properly ought not, does leave the car when thus stopping, does no illegal act, but he for the time surrenders his place as a passenger and takes upon himself the direction and responsibility of his own notions during his absence. He may return to his seat and resume his place and rights as a passenger on that train before it starts. But

[25] Fleming v. Brooklyn R. Co., 1 Abb. New Cas. 433; Duff v. Allegheny R. Co., 91 Pa. St. 458.

[26] Ohio, etc. R. Co. v. Mubling, 30 Ill. 9.

[27] Ryan v. Cumberland Valley R. Co., 23 Pa. St. 384; Gilshaman v. R. Co., 10 Cush. 228; Russell v. Hudson R. Co., 17 N. Y. 134; Tumey v. R. Co., L. R. 1 C. P. 291: Seaver v. Boston, etc. R. Co., 14 Gray, 466. *Contra:* Fitzpatrick v. New Albany R. Co., 7 Ind. 436, Gillenwater v. Madison, etc. R. Co., 5 Ind. 339.

[28] O'Donnell v. Allegheny R. Co., 59 Pa. St. 239; Gillenwater v. R. Co., 5 Ind. 339; 61 Am. Dec. 101.

[29] Jeffersonville, etc. R. Co. v. Riley, 39 Ind. 568.

[30] Keokuk v. R. Co., 88 Ill. 608; Clussman v. R. Co., 9 Hun, 618; 72 N. Y. 506.

[31] Jeffersonville R. Co. v. Riley, 39 Ind. 568.

[32] Hulbert v. R. Co., 40 N. Y. 145; Northup v. R. Co., 43 N. Y. 517.

[33] State v. Grand Trunk R. Co., 58 Me. 176.

while thus "his own man," he may be injured or killed as other persons not passengers may be, by the negligence or carelessness of the railroad or its agents, and the corporation may be liable for such negligence or carelessness. A question may arise as to the duties of the servants or agents of the road, when such passengers have left the cars without objection, and are on the platform or near the track when the train is about to start, or the coming train has signaled its approach. We think it but reasonable in such cases to require that the proper officer of servant of the corporation should give reasonable notice in time for such passengers to return to the cars, which they left safely, by using due and proper diligence, caution and care. But they are not bound or required to go after those who have gone away and out of sight and out of reach of the voice, which gives the usual loud and distinct notice for all to repair on board. If there be an established signal by blowing the whistle for passengers to take their places in the cars they should also be sounded. But if a passenger goes beyond this limit and does not, in fact, hear the summons, it is his fault or misfortune; the road has done its duty in this particular. We do not mean to say that, even in such a case, he may not be killed or injured by the negligence or carelessness of the corporation, within the meaning of the statute."

But where a passenger leaves the conveyance with no intention of returning,[34] or returns for a purpose of his own, unconnected with an intention to continue the journey,[35] he is no longer a passenger. The fact that a passenger who had considerable baggage on a train, for which he had no check, alighted from the train to assist in the transfer of that baggage, was held not to sever the relation of passenger and carrier, nor to make him a servant of the company, he having the right to identify his property.[36]

A person who enters a station or car to see another off, or to meet a coming guest or friend,[37] is not a tresspasser, but isthere by right, and the carrier is responsible for a negligent injury to such person. Thus, in one case, a man waiting at a railway station for his wife, whom he expected by train, having a call of nature, and no special resort being provided, stepped off a walk on the grounds in the dark, and fell into a hole and was hurt. The company was held liable.[38] In a Pennsylvania case, where a depot platform gave way on account of a great crowd which had assembled to hear the president of the United States speak, and many persons were thereby injured, and some killed, the court said: "Had it been the hour for the arrival or departure of a train, and he (the plaintiff) had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by authority of the defendants, as much as if he was actually a passenger, and it would then matter not how unusual might have been the crowd, the defendants would have been responsible. As to all such persons, to whom they stood in such a relation as required care on their part, they were bound to have the structure strong enough to bear all who could stand on it; as to all others they were liable only for wanton or intentional injury. The plaintiff was on the spot merely to enjoy himself, to gratify his curiosity, or to give vent to his patriotic feelings. The defendants had nothing to do with that."[39]

Common carriers are required to exercise the same degree of care in carrying passengers free as in carrying them for hire. Thus, persons riding free are "passengers."[40]

In Philadelphia, etc., R. Co. v. Derby,[41] Mr. Justice Grier said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And

[34] Platt v. R. Co., 4 Thomp. & C. 406.

[35] Pitts., etc. R. Co. v. Crouse, 30 Ohio St. 222.

[36] Ormand v. Hayes, 60 Tex. 180.

[37] Doss v. Missouri, etc. R. Co., 59 Mo. 27; 21 Am. Rep. 371. *Contra:* Lucas v. New Bedford R. Co., 6 Gray, 64; 66 Am. Dec. 406.

[38] McKone v. R. Co., 51 Mich. 601; 47 Am. Rep. 596.

[39] Gillis v. Penn. R. Co., 59 Pa. St. 129.

[40] Philadelphia, etc. R. Co. v. Derby, 14 How. 468; The New World v. King, 16 How. 469; Flint, etc. R. Co. v. Weir, 37 Mich. 111; Fay v. The New World, 1 Cal. 348; Gordon v. Grand St. R. Co., 40 Barb. 546; Indiana R. Co. v. Mundy, 21 Ind. 48; Ohio, etc. R. Co. v. Muhling, 30 Ill. 9; Illinois Cent. R. Co. v. Read, 37 *Id.* 484; Perkins v. New York Cent. R. Co., 24 N. Y. 196; Flime v. Phila., etc. R. Co., 1 Houst. 469; Todd v. Old Colony R. Co., 3 Allen, 18; 7 *Id.* 207; Lemon v. Chauslor, 68 Mo. 340; 30 Am. Rep. 799; Gillenwater v. R. Co., 5 Ind. 377; 61 Am. Dec. 107; Ohio, etc. R. Co. v. Nickless, 71 Ind. 271. See Blair v. Erie R. Co. 66 N. Y. 313; 23 Am. Rep. 55.

[41] *Supra.*

whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.''

JOHN D. LAWSON.

Avondale, N. J.

RECEIVING STOLEN PROPERTY — PRESUMPTIONS — CROSS-EXAMINATION OF DEFENDANT—IMPEACHMENT.

STATE v. BULLA.

Supreme Court of Missouri, November 15, 1886.

1. *Impeaching the Defendant.*—If a defendant in a criminal case testifies in his own behalf, his general moral character may be impeached.

2. *Cross-Examination of Defendant.*—When such a defendant testifies in his own behalf on cross-examination he can only be inquired of as to such matter as he has testified to in his examination-in-chief.

3. *Impeaching Evidence.*—In impeaching a witness single acts of moral delinquincy cannot be shown.

4. *Possession of Stolen Property—Presumptions.*—The possession by the defendant of stolen property recently after the theft raises a presumption that he stole it; but recent possession of stolen property by a defendant who is charged with receiving stolen property, knowing it to be stolen, raises no presumption that he had knowledge that it was stolen.

Appeal from Buchanan circuit court.

The opinion states the facts.

NORTON, J., delivered the opinion of the court:

The defendant was tried in the criminal court of Buchanan county, under an indictment containing two counts, in the first of which he is charged with grand larceny, in stealing a horse belonging to one Sampson, and in the second of which he is charged with receiving stolen property, knowing it to have been stolen. Defendant was acquitted on the first, and convicted on the second count, and from the judgment of conviction has appealed to this court. It appears from the record that, on the trial, defendant offered himself as a witness and was examined, and the state was then, over defendant's objections, allowed to introduce and examine witnesses touching his general moral character. There was no error in this. Where a defendant, criminally charged, is examined in his own behalf, he may be impeached as any other witness, except that on his cross-examination he can only be inquired of as to such matters as he has testified to in his examination-in-chief. State v. Palmer (not yet reported); State v. Grant, 79 Mo. 113; State v. Clinton, 67 Mo. 380.

As the case, for a reason yet to be given, must be remanded, in view of the latitude allowed in the cross-examination of defendant, and the witnesses who testified as to his general moral character, it may be well to remark that, in the re-trial, the cross-examination of defendant, should he again become a witness, should be confined to such matters as he may testify to in chief, and that the witnesses as to his character should not be allowed to testify as to single acts of moral delinquency.

The material error committed by the court was in the refusal of the following instruction: "4th. Unless the jury believe from all the evidence, beyond a reasonable doubt, that the defendant bought or received the horse mentioned in the indictment from some other person, knowing said horse to have been stolen, they will find him not guilty, as charged in the second count of the indictment; and the mere naked fact of the possession of said horse by the defendant raises no presumption that the defendant knew that said horse had been stolen by another."

In view of the fact which the record discloses that, in the first count of the indictment, defendant was charged with grand larceny in stealing the property, and the further fact that the court in reference to this count had properly instructed the jury that possession of stolen property, recently after the theft, raised the presumption that the possessor was the thief, and in view of the further fact that the defendant was charged in the second count on which he was convicted with receiving stolen property, knowing it to be stolen, we are of the opinion that the above instruction ought to have been given. While it is a well settled rule in this State that the possession by a person of stolen property recently after the theft, raises a presumption that he stole it, we have never gone so far as to intimate that recent possession of stolen property by a person who is charged with receiving stolen property, knowing it to be stolen, raises a presumption that he had knowledge that it was stolen; but on the contrary we are of the opinion that in such case no such presumption is to be indulged in. Under the circumstances of this case, the instruction asked for was not a mere abstraction, having no practical application to the facts, and it was error to refuse it, and for this error the judgment will be reversed, and the cause remanded.

All concur.

NOTE.—*Impeaching the Defendant.*—In a well-considered case by an able judge, where the defendant had testified in his own behalf, it was said: "Upon the trial of the case below, the defendant offered no evidence of his general character, but chose to rest upon the presumption which the law indulged in his favor. He went upon the stand as a witness in his own behalf. After he had closed his evidence, the State introduced a witness who, in answer to a question propounded to him, testified that he knew the general character of appellant, and that it was bad * * * The law invests every person accused of crime with a presumption in favor of good character, and the State cannot offer evidence to impeach such character until the accused has put his general character in issue by offering evidence in support of it. The presumption

in favor of good character continues, and must be indulged as long as the accused rests upon such presumption; but when he abandons the shield which the law has thrown about him, and atttempts by affirmative evidence to prove, as a fact, that his general character is good, he opens the door for the admission of evidence on the part of the State to prove that his character is bad. The law also indulges a presumption in favor of the good character of witnesses, and the party producing them cannot offer evidence in support of such character until the adverse party puts such character in issue in some of the modes known to the law. In the case of a defendant, he must put his character in issue, but in the case of a witness, the adverse party must put his general character in issue. These were familiar principles, well-known to the profession prior the passage of the act of March 10th, 1873, which gave to a defendant in a criminal cause the privilege of testifying in his own behalf. We are required, for the first time, to determine what charge, if any, have been produced in the rules of practice by the passage of said act. Prior to such enactment, the rights of a defendant and the privilege of a witness were separate and distinct; but since its passage, a defendant who elects to testify occupies the position of both defendant and witness, and thus he combines in his person the rights and privilege of both. But while this is true, we do not think it should result in any change in the law or rules of practice. In his capacity as a witness he is entitled to the same rights, and is subject to the same rules as any other witness. In his character of defendant, he has the same right, and is entitled to the same protection as were possessed and enjoyed by defendants in a criminal cause before the passage of the act in question. When we are considering the right of the appellant in his character of defendant, we lose sight of the fact that he has the right to testify as a witness; and when his privileges as a witness are called in question, they should be decided without reference to the fact that he is a defendant also. It necessarily results, from what has been said, that the State had no right to assail the general character of the appellant, as one accused of crime, for the reason he had not put his character in issue. It is conceded by counsel for appellant that the State had the right to impeach the appellant as a witness, by proving that his general character for truth and veracity was bad in the neighborhood of his residence; but it is very strenuously contended that the State had no right to prove what his general moral character, was to impeach him or a witness. * * * It is settled, by a very decided preponderance of authority, that, where the purpose was to impeach a witness, the inquiry was confined to general reputation for truth and veracity; and where the purpose was to inquire into the character of the defendant, the inquiry was generally limited to that trait of character which had some relevancy to the question in issue. Thus, it was said by the court, in Boon v. Weatherford,[1] that 'when a man's honesty is in question, his veracity is not in question. When his veracity is in question, one does not know whether he be of a peaceable or quarrelsome disposition. If the question is concerning honesty, the inquiry should be concerning honesty. If the question be one of veracity, the inquiry should be directed to the point at issue."

In the case of the United States v. Von Sickle,[2] the rule is stated with great force. It is there said: "The object of the examination is to shake and overthrow the credit of the witness. Now, this is effectually done by showing that, in the neighborhood in which he lives, and where his character is best known, he is not considered worthy of credit. Shall a public opinion which does not reach his credibility be proven as a fact from which the jury may infer a want of credibility? This would be an inference from public opinion which had not been shown by the public. It would be a conclusion inferred, not from original facts, but from an opinion formed on those facts by the public. It would be an inference on an inference. This would be a new rule, not yet incorporated, it is believed, into the law of evidence."

In Atwood v. Impson,[3] it is said: "With many, telling the truth is a habit and a principle which they adhere to always, though they may indulge in drinking, swearing. gambling, roystering, and making close bargains. With others, lying is the habit or principle, and if elevated to be senator or legislator, or made church-members or deacon, it does not always reform them." * * * The effect of an adverse ruling (to allow the defendant's moral character to be impeached) would be to put defendant's general moral character in issue, without his consent, which would necessarily and unavoidably prejudice him in his defense of the charge for which he is being tried. The evidence under examination was improper, as effecting the character of the accused, because he had not put his character in issue; and it was not improper for the purpose of impeaching the appellant or a witness, for the reason that, in a criminal cause, a witness cannot be impeached or sustained by proof of general moral character."[4] This case was subsequently followed in Indiana[5] until the rule was changed by statute.[6] In law the statute in Missouri is different from what the Indiana statute was, the principal case is at variance with Fletcher v. State.

Cross-Examination of Defendant.—"A defendant in a criminal case, who elects to testify is a witness

[1] 23 Tex. 682.

[2] 2 McLean, 219.

[3] 5 C. E. Green, 150.

[4] Fletcher v. State, 49 Ind. 124; S. C., 19 Am. Rep. 673. To sustain the proposition that, at common law, the inquiry into the general character of a witness was limited to the truth, the court cites the following authorities: Teese v. Huntingdon, 23 How. 2; U. S. v. Van Sickle, 2 McLean, 219; Gass v. Stinson, 2 Sumner, 605; Gilbert v. Sheldon, 13 Barb. 623; People v. Rector, 19 Wend. 569; Jackson v. Lewis, 13 Johns. 504; State v. Bruce, 24 Me. 71; Com. v. Moore, 13 Pick. 194; Morse v. Pineo, 4 Vt. 281; State v. Smith, 7 Vt. 141; Speare v. Forrest, 15 Vt. 435; State v. Randolph, 24 Conn. 363; State v. Howard, 9 N. H. 485; Gilchrist v. M'Kee, 4 Watts, 380; Chess v. Chess, 1 Penn. 32; Uhl v. Com., 6 Gratt. 706; Ward v. State, 28 Ala. 53; Ford v. Ford, 7 Humph. 92; Jones v. State, 13 Tex. 168; Craig v. State, 5 Ohio St. 605; Wike v. Lightner, 11 S. & R. 198; Bucklin v. State, 20 Ohio, 18; Thurman v. Virgin, 18 B. Mon. 785; Perkins v. Mobley, 4 Ohio St. 668; Bates v. Barber, 4 Cush. 107; Ayres v. Duprey, 27 Tex. 593; Noel v. Dickey, 3 Bibb, 268; Webber v. Hanke, 4 Mich. 198; Patriotic Bank v. Coote, 3 Cranch C. C. 169; U. S. v. Masters, 4 Cranch C. C. 479; U. S. v. White, 5 Cranch C. C. 38; U. S. v. Dickinson, 2 McLean, 325; Atwood v. Impson, 5 C. E. Green, 150; Newman v. Mackin, 13 Sm. & M. 383; Quinn v. State, 14 Ind. 589.

[5] Clark v. State, 50 Ind. 514; Mershon v. State. 51 Ind. 14; Farley v. State, 57 Ind. 331; Kidwell v. State, 63 Ind. 384; State v. Beal, 68 Ind. 345; Knight v. State, 70 Ind. 375; Strong v. State, 86 Ind. 208.

[6] Morrison v. State, 76 Ind. 335; Wachstetter v. State, 99 Ind. 290.

so far as the cross-examination is concerned, as any other witness. This defendant did elect to testify as a witness, and hence is to be treated as any other witness upon cross-examination. He puts himself in the position of a witness, and as a witness he must be regarded."[7] "But if he puts himself on the stand as a witness in his own behalf, and testifies that he did not commit the crime imputed to him, he thereby waives his constitutional privilege, and renders himself liable to be cross-examined upon all facts relevant and material to that issue, and cannot refuse to testify to any facts which would be competent evidence in the case, if proved by other witnesses."[8]

Possession of Stolen Property.—"If a party in whose exclusive possession goods recently stolen are found fails reasonably to account for his posession, when called upon to explain, or when the facts are such as require an explanation of him, the presumption of guilt arising from recent loss and possession will warrant a conviction, without the necessity of further proof."[9]

"Possession of stolen goods immediately after the theft may sometimes be almost conclusive of guilt, but the presumption weakens as the period of time between the theft and the possession increases, and may scarcely arise at all if others besides the accused have had equal access with himself to the place where the goods were found."[10]

"The recent, actual, unexplained possession of stolen goods is a fact from which the jury may infer the complicity of the defendant in the larceny. Whether it is sufficient evidence of guilt is a question for their determination. There may be cases in which it would stand alone, unconnected with any other criminating fact, and from it the jury would not probably infer guilt. Whether the inference is just and reasonable, whether the fact satisfies the minds of the jury, as reasonable men, beyond all reasonable doubt, of the guilt of the accused, the court cannot determine."[11]

"Possession of property recently stolen, unexplained, is held to be *prima facie* evidence of theft, and this court has held, and still holds, that there may be cases in which these facts would not only constitute a *prima facie* case, but would be sufficient upon which to convict. To be a *prima facie* case, the property must be stolen by some person; the possession must be recent; the defendant must be called upon to explain and fail to explain; and before a *prima facie* case can be made and claimed for the State, all of the above facts must be established by the evidence."[12]

"Recent possession, unexplained, where the circumstances demand explanation, has been, and is held (we think justly) sufficient. This applies to cases in which there is no evidence except the *corpus delicti*, recent possession, a demand for explanation, and a failure to explain. If there be other evidence, either for or against defendant, it may or may not be sufficient, depending always on its nature and weight o the evidence."[13]

"The unexplained possession of stolen property recently after the theft, is unquestionably a circumstance which often tends to prove the guilt of the party in whose possession it is found. Its force and effect to this end depends, however, upon all the facts and circumstances in the particular case under consideration. It is an inference of fact from the evidence, and not a presumption or conclusion of law from an established or admitted fact. This presumption may be and is often so plain and evident an inference from the fact, that in many cases it has not been thought to be a material error, requiring a reversal of the judgment, for the court to instruct the jury in general terms, that unexplained possession of stolen property, recently after it is stolen, warrants the presumption of the guilt of the party in whose possession it is found."[14]

"It is obvious that a party cannot, as a matter of law, be adjudged guilty of larceny upon proof that property has been stolen and recently thereafter found in his possession, in the absence of any explanation. Such proof show strong probability of guilt; but it is for the jury to determine its force, after due consideration of the kind of property, the length of time that may have elapsed between the taking and finding it in the possession of the accused, and the probability from the character of the property and other circumstances of the case, that the accused, if innocent, could show how he acquired possession. The latter, in regard to some property, could nearly always be shown by an innocent person, while it might be impossible for one receiving money from numerous persons, to show how he came in possession of a bank bill. In many cases judges have instructed juries that such proof was sufficient to convict. This is correct, with the addition that, if it convinced them of the guilt of the party, which would ordinarily be implied from the direction. In other cases, jurors have been instructed that this proof cast upon the accused the burden of showing how he acquired possession, and if he failed to satisfy them that he did so innocently, it was their duty to convict, such instructions are erroneous. It is for the prosecution to prove the commission of the crime by the accused, and the burden of doing so continues during the entire trial. When proof authorizing a conviction, if unrebutted or not explained, has been introduced, it is for the jury to determine whether it satisfies them of his guilt, as matter of fact, and not for the court, as matter of law, to direct them that it is sufficient, and that they must convict."[15]

"We think it well settled law, that the exclusive possession of the whole or some part of stolen property by the prisoner, recently after the theft, is sufficient,

[7] Boyle v. State, 105 Ind. 469; Thomas v. State, 103 Ind. 419; Com. v. Nichols, 114 Mass. 285; s. c., 19 Am. 346; State Ober, 52 N. H. 459; s. c., 13 Am. Rep. 88; Connors v. People, 50 N. Y. 240.

[8] Com. v. Nichols, 114 Mass. 285; s. c., 19 Am. Rep. 346; State v. Ober, 52 N. H. 459; s. c., 13 Am. Rep. 88; Conners v. People, 50 N. Y. 240; Inhabitants, etc. v. Henshaw, 101 Mass. 193; s. c., 3 Am. Rep. 333; Thomas v. State, 103 Ind. 438; s. c., 7 Crim. L. Mag. 50.

[9] Lehman v. State, 18 Tex. Ct. App. 174; s. c., 51 Am. Rep. 298.

[10] Gablick v. People, 40 Mich. 292.

[11] Underwood v. State, 72 Ala. 220.

[12] Schindler v. State, 15 Tex. Ct. App. 394.

[13] McNair v. State, 14 Tex. Ct. App. 83.

[14] Thomas v. State, 43 Tex. 658.

[15] Stover v. People, 56 N. Y. 315. This case is supported by the following authorities: State v. Hodge, 50 N. H. 510; Regina v. Langmead, 9 Cox C. C. 465; Henze v. People, 82 N. Y. 611; Coleman v. People, 53 N. Y. 555; Engleman v. State, 2 Ind. 91; Hall v. State, 8 Ind. 439; Smith v. State, 58 Ind. 340; Howard v. State, 50 Ind. 190; Turbeville v. State, 42 Ind. 490; Smathers v. State, 46 Ind. 447; Jones v. State, 49 Ind. 549; Clackner v. State, 33 Ind. 412; Wagner v. State, 107 Ind. 71; Lehman v. State; 18 Tex. Ct. App. 374; s. c., 51 Am. Rep. 298; People v. Hurley, 60 Cal. 74; s. c., 44 Am. Am. Rep. 55; Hoge v. People, 117 Ill. —; s. c., 6 N. E. Rep. 796; McLain v. State, 7 Crim. L. Mag. 199; Gablick v. People, 40 Mich. 292; Ingalls v. State, 48 Wis. 647; s. c., 1 Crim. L. Mag. 476; Grover v. State, 12 Wis. 591; State v. Snell, 46 Wis. 524; Wash's Case 16 Gratt. 530; Price v. Com., 21 Gratt. 846; State v. Heaton, 23 W. Va. 773.

when standing alone, to cast upon him the burden of explaining how he come by it, or of giving some explanation; and if he fail to do so, to warrant the jury in convicting him of the larceny."[16]

"Property recently stolen, found in the possession of a person, is always presumptive evidence against that person, unless the possession can be accounted for and explained. The principle is this: That if a person is found in possession of property recently stolen, and of which he can give no reasonable account, a jury are justified in coming to the conclusion that he committed the robbery; aad so it is of any time to which the robbery was incident, or with which it was connected."[17]

Receiving Stolen Property.—The court draws a well-defined distinction between having possession of recently stolen property on a charge of larceny and on a charge of receiving stolen property; for, to constitute the latter offense, the property must be received by the recipient and received with a knowledge of its criminal character. In those States where possession of recently stolen property is not sufficient to convict, the question touching receiving stolen property cannot be raised, as it is in the principle case.

"To render the offense of receiving stolen goods possible, the goods must retain their stolen character at the time the party charged received them, if, therefore, the goods have been transferred from the thief to a guilty receiver, the latter takes as a receiver, and not as a thief. In his hands, and as to him, the goods are not stolen. In his hands, the character of the goods is derived from his offense, and not from the offense of the person who stole them, so that one who receives such goods from him, however wickedly, is not guilty of receiving goods within the common law, or statutory definition of the offense, unless such second or subsequent receiver receives the goods under circumstances which connect him with the thief.[18] Hence, to sustain the charge of having received stolen goods, it must be proven that the goods were received, either directly or indirectly, from the thief, knowing them to have been stolen."[19]

The following instruction was held correct: "The possession of stolen goods, immediately after the larceny, if under peculiar and suspicious circumstances, where there is evidence tending to show that some other person or persons stole the property, such possession not being satisfactorily explained, will warrant a conviction."[20]

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[16] Knickerbocker v. People, 43 N. Y. 177.

[17] Reg. Exall, 4 F. & F. 922. See Rex v. Smith, 1 Ry. & M. 295. These two questions are supported by the following authorities: State v. Butterfield, 75 Mo. 297; State v. Brown, 75 Mo. 317; State v. Kelly, 9 Mo, App. 512 State v. Robbins, 65 Mo. 443; State v. Creek, 75 Mo. 406; State v. Sidney, 75 Mo. 390; State v. Boone, 70 Mo. 649; Kelly v. State, 73 Mo. 609; State v. Buckley, 60 Iowa, 47; State v. Hopkins, 21 N. W. Rep. 585; s. c., 19 Reporter, 76; State v. Rickarts, 57 Iowa, 247; s. c., 10 N. W. Rep. 657; Territory v. Casio, 1 Ariz. T. 485; People v. Terrell, 1 Wheel. Crim. Cas. 34; People v. Preston, 1 Wheel. Crim. Cas. 41; State v. Jennett, 88 N. C. 665; State v. McAfee, 68 Geo. 823.

[18] Citing 2 Bishop Crim. L. § 1140; Whart. Crim. L. § 983; Kaufman v. State. 49 Ind. 248; Owen v. State, 52 Ind. 379.

[19] Foster v. State, 106 Ind. 277; s. c., 8 Crim. L. 113; Regina v. Mallory, L. R. 13 Q. B. Div. 33; s. c., 50 L. T. 429; 32 W. R. 721; Regina v. Carter, L. R. 12 Q. B. Div. 522; s. c., 53 L. J. M. C. 96; 50 L. T. 432, 596; 32 W. R. 663; State v. Ward, 49 Conn. 429; Vincent v. State, 10 Tex. Ct. App. 330; Maney v. State, *Id.* 644; State v. Hodges, 55 Ind. 127; Aldrich v. People, 101 Ill. 16.

[20] Goldstein v. People, 82 N. Y. 231.

PENALTY — PENAL STATUTE — INTERSTATE LAW—USURY.

BLAINE v. CURTIS.

Supreme Court of Vermont, January 20, 1887.

1. *Penalty—Of Another State.*—One State will not enforce penalties prescribed by the laws of another State.

2. *What is a Penal Statute—Usury.*—A statute authorizing the recovery by the party aggrieved of three times the amount of usurious interest, illegally received by the defendant, is a penal statute, and the amount to be recovered so provided by it is a penalty.

3. *Penalty—Rulings of State Prescribing, Conclusion.*—Whether the statute of a State against usury is penal or otherwise is a question for the courts of that State, and when they have construed it and defined its character, such construction should control the courts of other States.

The facts appear in the opinion of the court, which was delivered by WALKER, J.:

The case comes before us upon general demurrer to the declaration, and the only question to be decided is, whether the forfeiture imposed by the laws of New Hampshire upon a person receiving interest at a higher rate than six per cent may be enforced by an action of debt, in favor of the person aggrieved, in this State.

The provisions of the statute, which are substantially set out in the declaration, are as follows: "If any person, upon any contract, receives interest at a higher rate than six per cent. he shall forfeit three times the sum so received in excess of said six per cent. to the person aggrieved, who will sue therefor."

It is alleged, in the declaration, that the defendant, at Piermont, in the State of New Hampshire, received upon a promissory note for the sum of $1,500, then held by the defendant and owing by the plaintiff to her $30 interest in excess of six per cent. from the plaintiff on the first day of May in each year for six years beginning with May, 1876, and ending with May, 1882—making $180 thus received by the defendant of the plaintiff in excess of six per cent. interest during the years named; it is also alleged that, by virtue of the statute of New Hampshire aforesaid, an action hath accrued to the plaintiff to recover of the defendant three times the excess of six per cent. interest so paid.

The case stated comes within the statute declared upon, and if the suit had been instituted in New Hampshire there could be no doubt of the right of the plaintiff to recover, if the action is not barred in that State by the statute of limitations.

The question here is, can the liability imposed by the statute be enforced out of the limits of New Hampshire? This must depend on the nature of the liability and the manner in which it is created. It is not a responsibility *ex contractu*. And the

question arises, Is it a liability imposed by the statute upon a person receiving illegal interest for a violation of its provisions and penal in its nature, or is it a statute declaratory of a common-law right and a means or way enacted for enforcing it, and, therefore, remedial in its nature?

If it only gave a remedy for an injury, against the person by whom it was committed to the person injured, and limited the recovery to the mere amount of loss sustained, or to cumulative damages as compensation for injury sustained, it would fall within the class of remedial statutes. 1 Bl. Com. 86; Francisco v. Gilmore, 1 Bos. & P. (N. R.) 179, 180; Woodgate v. Knatchbull, 2 T. R. 154, 155, note; 3 Saund. 376, note 7; Browne v. Gibbons, 1 Salk. 206; Boice v. Gibbons, 8 N. J. L. 324; Burnett v. Ward, 42 Vt. 80.

But this statute does not limit the recovery to the mere amount of the loss sustained, or to cumulative damages as compensation; it goes beyond and inflicts a punishment upon the offender. It makes the taking of illegal interest an offense, and prescribes a penalty of three times the amonnt of illegal interest taken. The right of action under it does not arise out of any privity existing between the person paying and the person receiving the illegal interest, but is derived entirely from the statute. The action given is not to recover back money that the person receiving had no lawful right to take and hold against the person paying it, but one to recover a penalty for a breach of a statute law and founded entirely upon the statute imposing the forfeiture.

It was held in Hubbell v. Gale, 3 Vt. 266, that whatever may be the form of the action, if it is founded entirely upon a statute and the object of it is to recover a penalty or forfeiture, it is a penal action. We think the liability created by the statute declared upon is clearly a statutory one, imposed upon the person receiving illegal interest as a wrong-doer, and penal in its nature. This view is supported by the decisions of many courts of last resort, some of which have been cited in the argument. We refer, however, only to a decision of the Supreme Court of the United States, in a case analogous to to the case at bar. The provisions of the act in question are similar to the provisions of the nation currency act of congress, approved June 3, 1864, which provides that, if unlawful interest is received by any banking association created by it, the person or persons paying the same, or their legal representatives, may recover back, in an action of debt, twice the amount of interest thus paid from the association taking or receiving the same. This provision of the currency act referred to came up for consideration by the Supreme Court of the United States, in the case of Barnet v. Muncie Nat. Bank, 98 U. S. 555 (Bk. 25, L. ed. 212), where the plaintiff in error sought to avail himself of the benefit of the act in his defense by way of off-set and counterclaim to the bill of exchange which the suit was brought. Justice Swayne, in delivering the opinion of the court, denied the relief sought, and said: "The remedy given by the statute for the wrong is a penal suit. To the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the redress. * * * The suit must be brought specially and exclusively to recover the penalty, where the sole issue is guilt or innocence of the accused."

This statute has been repeatedly under consideration by the Supreme Court of the State of New Hampshire and has been by that court invariably treated as a penal statute. Harper v. Bowman, 3 N. H. 489, was an action to recover a forfeiture of three times the illegal interest paid; it was objected that some part of the penalty was barred by the statute of limitations, and the court, inconsidering the question, held that the act limiting suits on penal statutes, which provided that actions upon any penal statute shall be brought within one year from the time of committing the offense, was controlling in the decision of the question raised.

In Kempton v. Sullvan Savings Inst., 53 N. H. 581, the court treated the statue as a penal one, in an able opinion upon its construction and rules of pleading applicable to actions brought upon it.

This construction which has been given to the statute by the supreme court of the State in which it was enacted, treating and holding it a penal statute, should be followed and is controlling in courts of this State. Hunt v. Hunt, 72 N. Y. 217; Leonard v. Steam Navigation Co., 84 N. Y. 48.

It is well settled that no State will enforce penalties imposed by the laws of another State. Such laws are universally considered as having no extra-territorial operation or effect, whether the penalty be to the public or to the persons. They are strictly local and effect nothing more than they can reach within the limits of the State in which they were enacted. They cannot be enforced in the courts of another State either by force of the statute or upon the principles of State comity. Story, Conf. L. §§ 620, 621; Rorer, Interstate L. 148, 165; Ogden v. Folliot, 3 T. R. 733; Scoville v. Canfield, 14 Johns. 338; First Nat. Bank of Plymouth v. Price, 33 Md. 487; Derrickson v. Smith, 27 N. J. L. 166; Barnes v. Whitaker, 22 Ill. 606; Sherman v. Gassett, 9 Ill. 521; Henry v. Sargeant, 13 N. H. 321; Slack v. Gibbs, 14 Vt. 357.

Actions for the recovery of a penalty or forfeiture given by laws of one State upon usurious contracts made and entered into in such State will not lie in another State. Such laws are held to be penal in their nature and governed by the general rule that they have no extraterritorial force, and can be enforced only by the courts of the State in which they are enacted. Rorer, Interstate L. 165; Barnes v. Whitaker, 22 Ill. 606; Sherman v. Gassett, 9 Ill. 521.

The judgment of the county court sustaining the demurrer and adjudging the declaration insufficient was correct, and is affirmed.

WEEKLY DIGEST OF RECENT CASES.

1. ACCEPTANCE—The acceptance of an order for the payment of money binds the acceptor only to the extent of the terms of the order and his acceptance of it.—*Everard v. Warner*, S. C. Minn., Feb. 2, 1887; 31 N. W. Rep. 353.

2. ADMIRALTY — *Yachts — Lights—Collisions.*— A steam yacht, described in her license as a pleasure yacht, with privilege of proceeding from port to port of the U. S. and by sea to foreign ports, is a coasting vessel, and will be responsible for a collision caused by carrying the lights prescribed for ocean-going steamers.—*Chase v. Belden*, N. Y. Ct. App., Jan. 18, 1887; 9 N. E. Rev. 852.

3. AGENCY — *Principal and Agent—Power to Indorse.*—Local agent of a machine company took notes to company on sale of a machine. Afterwards he indorsed one of these notes in the name of the company, and by agreement with a general agent took it in payment of his commission. *Held*, that title of company not divested by that indorsement.—*Englehart v. Peoria Plow Co.*, S. C. Neb., Jan. 6, 1887; 31 N. W. Rep. 391.

4. APPEAL—*Assignment of Error.*— A general assignment of error—"against the law and against the evidence"—insufficient in the Supreme Court of Texas.—*Jenkins v. American, etc. Co.*, S. C. Tex., Dec. 17, 1886; 2 S. W. Rep. 726.

5. —— *Attachment.*—Upon an attachment levied on the ground that the defendant had not enough property in the State to satisfy plaintiff's demand, the judgment will not be reversed on appeal because the evidence as to the value of the property is conflicting.—*Hayley v. Viley*, Ky. Ct. App. Jan. 20, 1887; 2 S. W. Rep. 681.

6. —— *Issue as to Signature — Waiver.*—When the genuineness of a signature to a receipt is disputed in an action for specific performance, and reported on adversely by the master to whom it had been referred, no exception to such report being filed in the court below, the objection cannot be raised upon appeal that the Virginia code 1873, ch. 167, § 39 had not been followed.—*Harnsberger v. Cochran*, Va, Ct. App. Jan. 13, 1887; 1 S. E. Rep. 120.

7. —— *Special Judge—Regularity — Exceptions—Bill of—Trust Deed—Sale—Estoppel.*— Upon an appeal the appointment of a special judge will be presumed regular. A bill of exceptions must show failure of trial judge to rule as requested, to bring up questions on appeal. A grantor in a deed of trust who, upon inquiry by an intending purchaser, refers him to the trustees who had bought in the property at the sale, and afterwards re-sold it to the inquiring purchaser, cannot dispute such purchaser's title on the ground that the trustees had not made the sale at the prescribed place.—*Hess v. Dean*, S. C. Tex., Nov. 9, 1886; 2 S. W. Rep. 727.

8. ASSAULT AND BATTERY— *Affidavit — Motion to Quash.*—The affidavit that, in the county of Tipton, State of Indiana, at a time specified, the defendant did then and there, having the present ability to do so, unlawfully attempt to commit a violent injury upon the person of J F, this affiant, contrary to the form of the statute, etc., is good on motion to quash.—*State v. Kinder*, S. C. Ind., Jan. 13, 1887; 9 N. E. Rep. 917.

9. —— *Civil Action—Ejection of Intruder — Justification—Malice, Proof of—Admissions—Instructions Misleading.*—An attorney has a right to go to client's creditor and make a tender. After that, if he refuses to leave, creditor can use necessary force to eject him. A statement of defendant after the assault is inadmissible to show malice at time of assault. The admissions of defendant at trial of criminal action for assault are admissible. Instructions not pertinent to the issues are wrong as misleading.— *Breitenbach v. Trowbridge*, S. C. Mich., Jan. 20, 1887; 31 N. W. Rep. 402.

10. ASSIGNMENT—*For Benefit of Creditors—Chattel Mortgage—Nebraska Law.*—A chattel mortgage of his stock of goods by A to B, for benefit of certain of A's creditors, to be void if A paid his notes then made to those creditors, with power given to B to take possession and sell in usual course of business, and to pay balance to A after paying those notes; *held*, to be assignment for benefit of creditors and void for not complying with Nebraska law.—*Bonus v. Carter*, S. C. Neb. Jan. 6, 1887; 31 N. W. Rep. 381.

11. —— *For Creditors—Preference—Indiana Law.*—Where a party assigns his property for benefit of creditors and says it is under the Indiana law, and gives preferences, the assignment is good, but the preferences are void.—*Redpath v. Tutewiler*, S. C. Ind., Jan. 14, 1887; 9 N. E. Rep. 911.

12. —— *Equitable—Priority—Attorney—Bona Fide Purchaser.*—Where a party agrees to give his attorney a part of a claim, no matter how collected, and subsequently assigns it to a party ignorant of his agreement, who compromises it, the assignee is bound by the agreement. When a party assigns worthless claims for non-negotiable bonds, he parts with no valuable consideration and is not a *bona fide* purchaser.—*Fairbank v. Sargent*, N. Y. Ct. App., Jan. 18, 1887; 9 N. E. Rep. 870.

13. ATTACHMENT— *Bond to Dissolve.*—A security

in a bond to dissolae an attachment is absolutely liable, whether the attachment was legally issued or not, for the amount recovered from his principal, the attachment debtor.—*Ferguson v. Glidewell*, S. C. Ark., Jan. 15, 1887; 2 S. W. Rep. 711.

14. BAIL—*Bonds, Payment of — Municipal Court—Duress—Threats of Arrest.*—Where party forfeits bond for appearance in Minneapolis municipal court, sureties may discharge themselves by paying amount of bond to clerk of the court. When party acts through fear of threatened illegal arrest, he acts under duress.—*Flannigan v. Minneapolis*, S. C. Minn., Feb. 9, 1887; 31 N. W. Rep. 359.

15. BANKS—*Special Deposit Loan—Theft of Bonds Deposited.*—A bank receiving bonds as special deposit, then loaning money on them as collateral security, holding again as special deposit, again holding them as security for overdrafts, when at last the bonds were stolen, were held liable as pledgees. Having been guilty of gross negligence in allowing undue facilities to its assistant cashier, who stole the bonds, the bank was held responsible for them.—*Prather v. Kean*, U. S. C. C. Ill., Jan. 3, 1887; 29 Fed. Rep. 498.

16. —— *Depositor—Set-off—Partner.*—A bank has a right of set-off against a depositor only when he stands in the same relation as a det tor. A partnership debt cannot be set-off against an individual deposit.—*Intenational Bank v. Jones*, S. C. Ill., Jan. 25, 1887; 9 N. E. Rep. 885.

17. CHATTEL MORTGAGE — *Registration—Removal.*—When chattel mortgage is duly filed, it will be constructive notice in whatever county the mortgagor may remove the property.—*Cool v. Roche*, S. C. Neb., Jan. 6, 1887; 31 N. W. Rep. 367.

18. COMMON CARRIERS — *Railroads — Depot Accommodations—Railroad Commissioners.*—A railroad company is not bound by common law, nor by N. Y. laws, to provide depots for passengers or freight seeking transportation. Neither the courts nor the railroad commissioners can compel the railroads, under New York laws, to carry into effect the decisions of the commissioners.— *People v. N. Y., etc. R. Co.*, N. Y. Ct. App., Jan. 18, 1887; 9 N. E. Rep. 856.

19. CONSTITUTIONAL LAW — *Eminent Domain — Compensation—Minn. Law.*—The Minnesota law requiring railroads to permit others to construct elevators on their lands is void, because it does not provide for compensation.—*State v. Chicago, etc. R. Co.*, S. C. Minn., Feb. 9, 1887; 31 N. W. Rep. 365.

20. —— *Term of Office—Legislature.*—The legislature has no power to extend the term of an office, which is fixed and limited by the constitution.—*State v. Brewster*, S. C. Ohio, Jan. 18, 1887; 9 N. E. Rep. 849.

21. —— *Title of Act.*—Michigan Session Act, No. 214, 1885, held unconstitutional, because it embraces different objects and does not express its object in the title.—*Church v. Detroit*, S. C. Mich., Jan. 27, 1887; 31 N. W. Rep. 447.

22. CONTRACT — *Ambiguous—Parol Evidence.*—C drew an order on B in favor of A, upon which were the words "to be paid out of the last payment." B accepted the order. The contract being ambiguous, parol evidence is admissible to explain it.—*Proctor v. Hartigan*, S. J. C. Mass , Jan. 31, 1887; 9 N. E. Rep. 841.

23. CORPORATIONS—*Capital Stock — Surrender—Creditors—Defense.*—No by-law releasing a stockholder from his subscription by surrendering his stock is valid against creditors of the corporation, and in such suit a stockholder cannot show that all the stock was not taken.—*Farnsworth v. Robbins*, S. C. Minn., Jan. 31, 1887; 31 N. W. Rep. 349.

24. —— *Stockholders, Liability of—Dissolution—Const. Wis.—Foreman—Payment, Application of by Laborers—Stock Held Absolutely or as Security — Claim against Assignee — Waiver* — Dissolution of corporations voluntarily or by ceasing to act, does not affect rights of creditors against stockholders under Wisconsin law, making them liable to amount of their stock for payment of employees. Under const. of Wisconsin, the legislature can fix the liabilities of stockholders of existing corporations as to all debts contracted after such law. Where there is no assets of corporations, the court may ascertain the liabilities of the stockholders and render judgment therefor, without the appointment of a receiver or staying the judgment to see if the assignee, to whom the corporation assigned, will be able to pay a dividend. A foreman, though he performs no manual labor, is, under the Wisconsin law, a servant. When a corporation pays a laborer and an application of the payment is made by either party for six months, the laborer may apply it to the wages first earned by him. Where stock stands on the books of a corporation in a party's name, and he voted on it, it is immaterial as to his liability whether he holds it absolutely or as security. The presentation by a laborer of a claim for his wages against the assignee of a corporation, is not a waiver of his claim against the stockholders.—*Sleeper v. Goodwin*, S. C. Wis., Jan. 11, 1887; 31 N. W. Rep. 335.

25. COUNTY — *County Board — Bonus to Contractor.*—Where law gives compensation for building a road, a *bonus* to a person taking the contract on those terms, voted by the county board before the contract is let, is void.—*Davis v. Ontonagon Co.*, S. C. Mich., Jan. 20, 1887; 31 N. W. Rep. 405.

26. —— *Subscribing to Railroad Stock—Constitutional Law—Title of Act, etc.—Popular Vote—Injunction.*—Kentucky statute authorizing Bourbon county to subscribe for railroad stock construed. Rule as to title of act embracing subject matter. Act authorizing subscription to stock to be made upon vote of a majority of the voters of the county *outside* of the county town, *held*, constitutional. Circuit court may, in a proper case, enjoin county court from subscribing for stock.—*Kentucky, etc. R. Co., v. Bourbon County*, Ky. Ct. App., Jan. 29, 1887; 2 S. W. Rep. 687.

27. —— *Supervisors Jurisdiction Judgment.* — Supervisors in Arkansas can sit but six days, and the proceedings of a board at an adjourned meeting beyond that time are *coraam non judice* and void; jurisdiction cannot be conferred on such a board by appearance and consent. A judgment without jurisdiction may be resisted at any time its enforcement is attempted. Ruling as to county scrip issued under authority of the confederate government.—*Grimmett v. Askew*, S. C. Ark., Jan. 8, 1887; 2 S. W. Rep. 707.

28. COURTS — *Probate—Administrator's Account—Review.*—A probate court may settle by decree an administrator's account, but cannot subsequently review such decree.—*Grady v. Hughes*, S. C. Mich., Jan. 27, 1887; 31 N. W. Rep. 438.

29. COVENANT—*Running with Land—Sale—Lease.*—A covenanted by deed, duly recorded, to pay and deliver to B the oil and mineral substances produced from certain land during a certain time. He afterwards sold the land. *Held*, that the covenant was personal and did not bind A's grantees.—*Newburg Pet. Co. v. Weare*, S. C. Ohio, Jan. 18, 1887; 9 N. E. Rep. 845.

30. CRIMINAL LAW—*Evidence—Flight—Good Character.*—To convict of crime the jury must have no reasonable doubt of guilt. Flight of accused tends strongly to show guilt. Evidence of good character is a valuable aid to the defendant.—*United States v. Jackson*, U. S. C. C., Ga., October Term, 1886; 29 Fed. Rep. 503.

31. —— *Formal Objections—Superior Court.*—A merely formal objection cannot be taken for the first time in the superior court.—*Com. v. Hosey*, S. J. C. Mass., Jan. 31, 1887; 9 N. E. Rep. 838.

32. —— *Intoxicating Liquors — Complaint—Motion to Quash—Superior Court.*—An allegation that defendant brought liquor into said city with intent then and there to sell it, imports he was not transporting it to a place beyond. The objection is formal and cannot be raised in superior court for the first time.—*Com. v. Keefe*, S. J. C. Mass., Jan. 31, 1887; 9 N. E. Rep. 840.

33. —— —— *Duplicity.*—An allegation of maintaining a common nuisance on one day, and at divers other days, and at times between that and another day, charges but one offense.—*Com. v. Sheehan*, S. J. C. Mass., Jan. 31, 1887; 9 N. E. Rep. 839.

34. —— —— *Time—Evidence—Record.*—Where complaint charges keeping a tenement used for illegal sale of liquor on a certain day, and on divers other days, from that day to another set forth, evidence of so doing at any part of the time is competent. When justice's record says defendant appeared on a certain day by virtue of within warrant, and after due examination was considered guilty and sentenced, the record sufficiently show conviction and time thereof and of the trial.—*Com. v. Hersey*. S. J. C. Mass., Jan. 31, 1887; 9 N. E. Rep. 838.

35. —— *Jurors — Summoning Officer— Larceny—Harmless Error.*—If talesmen a resummoned by an unsworn officer, the judgment must be reversed and the verdict set aside. It is a harmless error to exclude testimony to facts sufficiently otherwise proved. Texas statutes regulating the branding and marking of cattle construed. Unrecorded marks are admissible in evidence of ownership.—*Wyers v. State*, Ct. App. Tex., Nov. 13, 1886; 2 S. W. Rep. 722.

36. —— *Manslaughter—Evidence.*—Upon a trial for manslaughter for killing a by-stander in an affray, it is competent for the defendant to prove that the person he shot at had made threats and was the aggressor, so that the fatal shot was fired in self-defense.—*Hart v. Commonwealth*, Ky. Ct. App., Jan. 22, 1887; 2 S. W. Rep. 673.

37. CUSTOMS DUTIES—*Foreign Money.*—The rule of reducing foreign coin to United States money in computations for paying duties, is controlled by the statute in effect before the entry, although after the exportation of the goods.—*Heinemann v. Rollins*, U. S. S. C., Jan. 24, 1887; 7 S. C. Rep. 446.

38. —— *Secretary of the Treasury—Decision of.*—When duties are paid under protest, and an appeal taken to the secretary of the treasury, his decision is not conclusive if the payment has been made on estimated valuation but the demand increased upon re-valuation.—*United States v. Schlesenger*, U. S. S. C., Jan. 24, 1887; 7 S. C. Rep. 442.

39. DECEIT—*False Representation—When Action will Lie.*—Where party makes a false repesentation of a material fact, knowing it to be false, or not knowing whether it is true or false, to induce another to act on it, who with reasonable prudence does so act, he is liable to an action, though he derives no benefit therefrom. It may concern the condition, quality or other matters affecting property which such party contemplates buying.—*Busterud v. Farmington*, S. C. Minn., Jan. 3, 1887; 31 N. W. Red. 360.

40. DIVORCE — *Cruel Treatment.* — Husband gave wife only $2.50 during their residence together of one year. He was in the habit of swearing at her, and of using vile and indecent language in presence of her children, by a former marriage, and he flogged one of them. He frequently threatened to drive the children away and told her he would live with her no longer. After the separation he gave her no support. *Held*, she was entitled to a divorce for cruel treatment and failure to support.—*Whitacre v. Whitacre*, S. C. Mich., Jan. 13, 1887; 31 N. W. Rep. 327.

41. DOMICILE — *Change of Residence—Statute of Limitations.*—An intention to change one's residence does not change his domicile, even if preliminary steps for that purpose have been taken. One who moves his family in August and follow them in January, does not change his domicile until the latter date. The law of New York (Code Civ. Proc. § 390) provides that an action by a resident of another State for personal injuries is limited by the statute of limitations of the State of his domicile.—*Penfield v. Chesapeake, etc. Co.*, U. S. C. C. N. Y., Dec. 28, 1886; 29 Fed. Rep. 494.

42. DURESS—*Husband and Wife.*—A widow cannot recover dower, although she was in constant fear of being returned to a lunatic asylum, if it appears that she executed the deed conveying away her dower, not for fear but in consequence of certain promises made by her husband, there being no mistake nor any fraud on the part of the grantee of the deed.—*Ritter v. Bell*, Ct. App. Ky., Jan. 22, 1887; 2 S. W. Rep. 675.

43. EJECTMENT—*Betterments Statutes—Operation of.*—A defendant is entitled to the benefit of the betterments act (Mansf. Dig. § 2644), although plaintiff was an infant, and although his title was on record when the purchase and improvements were made. A case is decided according to the law as it stands when judgment is rendered, and is controlled by a statue passed while the action is pending—*Quære.*—*Beard v. Dausty*, S. C. Ark., Jan. 15, 1887; 2 S. W. Rep. 701.

44. —— *Wife's Land— Conveyance by Husband— Statue of Limitations.*— In ejectment plaintiff must recover on his own title. Party buying from husband, who laid a warrant on it, land of his deceased wife, may acquire title by adverse possession, though he knew the true condition of the title.—*Kelly v. McKeon*, S. C. Wis., Jan. 11, 1887; 31 N. W. Rep. 324.

45. EQUITY—*Accounting Advances.*—A party cannot by advancing money on a power of attorney to take possession of the lands of another claim that such advances created a partnership between them' but he is entitled to an accounting and to repayment of his advances out of the property in which the money so advanced was invested.—*Brower v. Brower*, U. S. C. C. Minn., Jan. 8, 1887; 29 Fed. Rep. 485.

46. —— *Account—Jurisdiction—Fraud — Limitations.*—A bill charging fraud and asking an account makes a case of equitable jurisdiction. Federal courts, in questions of fraud, will follow the statute of limitations of the State in which the action is brought. Rule declared as to suspension of the statute by death. *Keiry v. Lake Shere, etc. Co.*, U. S. S. C., Jan. 10, 1887; 7 S. C. Rep. 430.

47. —— *Bill—Title to Real Estate.*—Where it is alleged plaintiff acquired all the right, title and interest to the waters of a certain pond, and all the dams, sluices and water-ways connected therewith, what he took thereby depends upon its construction. Where a copy of the deed is not furnished, such a bill cannot be considered by the full court.—*Flax Pond Water Co. v. City of Lynn*, S. J. C. Mass., Jan. 24, 1887; 9 N. E. Rep. 836.

48. —— *Cancellation of Deed—Proof.*—The proof must be clear and convincing to cancel a recorded deed as a forgery.—*Oliver v Oliver*, S. C. Ill., Jan. 25, 1887; 9 N. E. Rep. 891.

49. —— *Mortgage— Fraud — Special Finding — Assignment — Preference — Agreement with Assignee.*—A suit brought to set aside a mortgage for fraud is equitable and triable by the court. Matters of evidence should not be stated in a special finding, and where plaintiff's cause of action depends upon establishing fraud, the finding must find fraud as a fact, or he will not be entitled to judgment. A mortgage executed to a creditor five days before an assignment is valid unless fraudulent. An agreement between a prior mortgagee and the assignee for the assignee to sell the goods and apply proceeds on mortgage is valid.—*Stix v. Sadler*, S. C. Ind., Jan. 14, 1887; 9 N. E. Rep. 905.

50. —— *Practice—Receivers — Federal Courts — Exceptions—Mortgage — Description — Fraud.*—Federal courts will appoint receivers in States where that practice is used. A master's report is presumed to be correct, exceptions must be supported by evidence, and the report will be set aside if the weight of evidence is against it. A court will protect creditors against loss by interference of parties with the receiver's sale. Description of goods mortgaged must be clear and explicit. Purchase of goods without a reasonable ability to pay for them is a fraud, and the sale will be rescinded for it.—*Jaffray v. Brown*, U. S. C. C. Ga., Oct. 26, 188; 29 Fed. Rep. 476.

51. —— *Recovery of Purchase Money—Remedy at Law.*—Where by will land was "leased" to A for life, remainder in fee to his children, but one-half of the value of the land to be paid to B, no such payment was made and A sold his life estate to B. After judicial proceedings in a court without jurisdiction the land was sold by its order, and after the death of A his children recovered the property in ejectment, the purchaser under the decree having filed a bill to recover back his purchase money, it was *held*, that if he was entitled to any remedy it was at law.—*Abernathy v. Phillips*, Va., Ct. App. Jan. 13, 188; 1 S. E. Rep. 113.

52. —— *Rescission — Settlement of Equities.*— A conveyed land to B on B's agreement to pay A's mortgage to C, the owner thereof, B agreeing to pay C the balance of the purchase price. Upon B's refusal to complete the contract A is entitled to have the contract rescinded, unless C files a cross-bill to have B fulfill his contract with him, which filing the court should have ordered as a court of equity.—*Sims v. Burke*, S. C. Ind., Jan. 8, 1887; 9 N. E. Rep. 902.

53. —— *Specific Performance Cross-Bill.*— One who purchases from one partner land which the other partner subsequently sells to a party who has notice of the prior sale, is entitled to a decree for specific performance. A cross-bill for affirmative relief must state a cause of action of equitable character and not of a demand cognizable in a court of law.—*Hughey v. Bratton*, S. C. Ark., Jan. 1, 1887; 2 S. W. Rep. 698.

54. ESTOPPEL—*Bonds — Municipal Corporations— Compromise—Re-issue.*—Where municipal bonds, issued in excess of amount allowed on valuation of wealth, were repudiated, but judgment was obtained thereon; then, on compromise, new bonds were issued, and the municipality compelled the State officers to certify them by *mandamus*: *Held*, the municipality was estopped to deny the validity of the new bonds in the hands of *bona fide* holders for value.—*State v. Wilkinson*, S. C. Neb., Jan. 6, 1887; 31 N. W. Rep. 376.

55. —— *Grantee cannot set up Adverse Possession —Basterdy—Legitimation.*—The grantee of a deed accepted cannot set up adverse possession against his grantor's title. To what children Kentucky statute (1796) of legitimation applies.—*Workman v. Harold*, Ky. Ct. App., Jan. 20, 1887; 2 S. W. Rep. 679.

56. —— *By Judgment—Conclusions of Sureties.*— Evidence tending to prove sureties agreed to attend to suit against themselves and principals, which was allowed to go by default: *Held*, sureties were estopped by the judgment in action by principals against them.—*Macky v. Fisher*, S. C. Minn., Jan. 28, 1887; 31 N. W. Rep. 363.

57. EVIDENCE—*Contributory Statements.*—Where evidence of contradictory statement of witness, introduced without objection, without properly calling his attention, it may be considered by jury.—*Cool v. Roche*, S. C. Neb., Jan. 6, 1887; 31 N. W. Rep. 367.

58. —— *Judgment — Record, Change of—Exceptions, Bill of—Order Book Entry—Evidence, Materiality of.*—A judgment regular on its face cannot be collaterally attacked by showing it was

changed after entry but before signature by judge. An order book entry that court instructed jury to return certain verdict, cannot take the place of a bill of exceptions. In action of ejectment proffered evidence that all matters had been compromised is properly excluded, when there is no statement of the nature of the compromise and nothing to show its materiality.—*Hall v. Durham*, S. C. Ind., Jan. 27, 1887; 9 N. E. Rep. 926.

59. —— *Limitations, Statute of—Burden of Proof—Motion for Verdict.*—Where party relies on statute of limitations, alleging cause of action and concealment thereof, he has the burden of proof on both points. Motion to exclude evidence or for verdict may be made before or after the opposing evidence is heard or by instruction.—*Bartalott v. International Bank of Chicago*, S. C. Ill., Jan. 25, 1887, 9 N. E. Rep. 898.

60. EXECUTORS—*Negligence—Weight of Evidence.*—An administrator must exercise such care as prudent men use toward their own property, and this court will not reverse a judgmant against him for negligence on the mere weight of evidence.—*Cooper v. Williams*, S. C. Ind., Jan. 15, 1887; 9 N. E. Rep. 917.

61. FRAUD—*Fraudulent Conveyance—Estoppel.*—A debtor may lawfully sell his goods at a fair price to his creditor in payment of his debt, and the latter is not affected by the alleged or presumed intent of the debtor to hinder other creditors. That a seller of goods retains possession of them is a badge of fraud. A creditor is not estopped from accepting a preference by promises to other execution creditors that he will see that the debtor shall not sell the goods.—*Edwards v. Dickson*, S. C. Tex., Oct. 29, 1886; 2 S. W. Rep. 718.

62. FRAUDULENT CONVEYANCE — *Husband and Wife Exempt Property—Evidence.*—Where husband had property conveyed to him without knowledge of wife, who furnished all the money and subsequently incumbered it to improve it, and afterwards conveys it to his wife, his creditors cannot set aside such conveyance, and they are both competent witnesses to prove the facts in suit by administrator of a creditor, who is a stranger to the transaction. A voluntary conveyance of exempt property, is not a fraud on the creditors of the grantor.—*Taylor v. Duesterberg*, S. C. Ind., Jan. 11, 1887; 9 N. E. Rep. 907.

63. FRAUDS—*Statute of.*—Unless the papers relied upon as containing a contract for the sale of land show that the minds of the parties met, and both contemplated the same quantity of land and the same purchase money, there is no sale under the statute of frauds. If the vendor's letters show that he proposed to sell a given quantity of land at a specified price, and the purchaser's letters that he expected to buy more land for that sum, these papers do not constitute the "memorandum" required by the statute of frauds.—*Barten v. Patrick*, S. C. Neb., Jan. 6, 1887; 31 N. W. Rep. 370.

64. GARNISHMENT — *Intervenor — Evidence.*— On trial of intervening petition evidence of agreement, by which intervenor gave garnishee property to sell and devote proceeds (the sum garnished), in a certain way, is admissible against garnishee and plaintiff.—*Ripley v. Ayer*, S. C. Ill., Jan. 25, 1887; 9 N. E. Rep. 894.

65. HOMESTEAD — *Estoppel.*— When a husband's right to a homestead is put in issue in a lawsuit, an adverse decision is conclusive against him, although his wife had not waived her right to homestead.—*Lindsey v. Sayre*, Ky. Ct. App., Jan. 15, 1887; 2 S. W. Rep. 678.

66. —— *Illegal Second Marriage—Rights of Non-resident Wife.*—Where husband leaves his wife and children, goes to another State and marries and lives with his second wife till death, his first wife has no homestead rights in property acquired by him and used as a homestead in the latter State, she having always been a non-resident.—*Stanton v. Hitchcock*, S. C. Mich., Jan. 20, 1887; 31 N. W. Rep. 395.

67. —— *Mortgage.*— One who lawfully secures a homestead out of the public lands of the United States, may mortgage the land after he has received a certificate.—*Lewis v. Wetherall*, S. C. Minn., Feb. 2, 1887; 31 N. W. Rep. 356.

68. —— *Wife's Signature—Fraud by Husband.*— On statement of husband that he would buy cheaper homestead and use difference in business, wife signed deed conveying same to a friend, who immediately conveyed it to husband's mother, both deeds being without consideration. Four days thereafter husband moved his effects and the children to his mother's. *Held*, the transaction was a fraud on the wife, and relief would be granted.—*Spiegel v. Spiegel*, S. C. Mich., Jan. 20, 1887; 31 N. W. Rep. 328.

69. HUSBAND AND WIFE — *Acknowledgment of Wife—Deputy Clerk — Homestead — Witness.* — Construction of Kentucky statute (Gen. Stat. Ky. ch. 24, § 38), which provides that, if a deputy clerk takes the acknowledgement of a *feme covert*, the clerk may complete the certificate. In Kentucky (Gen. Stat. Ky. ch. 38, art. 13, § 14), the land of a decedent may be sold to pay his debts, subject to the homestead right of his widow and children. One may testify as to a transaction with a deceased person, when a party adversely interested has been permitted to testify.—*Waters v. Davis*, Ky. Ct. App., Jan. 27, 1887; 2 S. W. Rep. 695.

70. —— *Dower.*—Where a party sold land to pay his debts, and his wife refused to part with her dower unless she received one of the bonds for the purchase money, and her husband gave her the bond with the assent of the purchaser of the land, the purchaser could not defeat a recovery on the bond, because it was in terms "not transferrable until the land is clear of all incumbrances."—*Nicholas v. Austin*, Va. Ct. App., Jan. 27, 1887; 1 S. E. Rep. 132.

71. INSANE PERSON—*Accounts — Expending Principal—Commissions.*—A committee of a lunatic is entitled, when necessary for the support of his ward, to exceed the income and encroach upon the principal of the estate. And after the death of his ward as against her administrators he is entitled to the usual commissions, to be retained out of the principal. *Davidson v. Pope*, Va. Ct. App., Jan. 27, 1887; 1 S. E. Rep. 117.

72. INSOLVENCY — *Preference.*— A conveyance of property or payment may be a preference, though their object was to secure extension of credit to continue business. Evidence considered sufficient.

—*Corliss v. Jewett*, S. C. Minn., Jan. 31, 1887; 31 N. W. Rep. 362.

73. INSURANCE—*Fire Insurance—Fee Simple Title to Property Insured.*—One who has paid for the insured property and holds a valid obligation to convey the title executed by the owner thereof, is the owner in fee simple, sole and unconditional, within the meaning of a policy of fire insurance.—*Lewis v. New England, etc. Co.*, U. S. C. C., Vt., Dec. 29, 1886; 29 Fed. Rep. 496.

74. —— *Life Insurance—Assignment of Policy.*—Where two assignments of a policy have been made by the beneficiary, both apparently valid, the assignment first executed in point of fact, whether so appearing upon the papers or not, is entitle to the preference.—*Roberts v. Phœnix, etc. Co.*, U. S. S. C., Jan. 24, 1887; 7 S. C. Rep. 448.

75. INTOXICATING LIQUORS—*Continuing Offense—Jurisdiction.*—Illegally keeping liquor for sale is a continuing offense, and may be alleged with a *continuendo*. The court, where the offense is committed, has jurisdiction.—*Com. v. Hersey*, S. J. C. Mass., Jan. 31, 1887; 9 N. E. Rep. 837.

76. JURISDICTION — *Officers of a State — Action against.*—An action against an officer of a State to recover money which he claims as the property of the State, is an action against the State, and cannot be maintained in any court of South Carolina.—*Lowrey v. Commissioners, etc.*, S. C. S. Car., Nov. 22, 1886; 1 S. E. Rep. 141.

77. —— *Parties—Procedure—Redemption—Interest.*—A federal court has no jurisdiction of a suit against a corporation in which some of the plaintiffs are citizens of the same State with the corporation. They are not proper parties. A right to redeem mortgage property conferred by a State is a property right, and will be respected by a federal court foreclosing the mortgage. By Vermont law, bonds bear the same interest after maturity as before, according to the terms of the bond.—*Jackson, & Sharp, etc. Co. v. Burlington, etc. R. Co.*, U. S. C. C., Vt., Jan. 5, 1887; 29 Fed. Rep. 474.

78. LIMITATIONS—*Statute of—Application to Federal Courts.*—A State statute of limitations will not control a federal court in adjudicating an action for infringment of a patent. But such a court is bound by a State statute prescribing the manner in which claims against a county must be presented to the proper officers.—*May v. Buchanan*, U. S. C. C., Iowa, Nov. Term, 1886; 29 Fed. Rep. 469.

79. MASTER AND SERVANT — *Negligence.* — Piling coal on tender of engine above the top was not negligence, and its falling on a track-walker was an accident and not actionable.—*Schultz v. C., etc. R. Co.*, S. C. Wis., Jan. 11, 1887; 31 N. W. Rep. 321.

80. MICHIGAN COURTS—*Jurisdiction—Certiorari.*—The circuit court of Wayne county is a superior court to the recorder's court of Detroit, and can issue a *certiorari* to that tribunal and review its rulings.—*Swift v. Wayne Co. Judge*, S. C. Mich., Jan. 20, 1887; 31 N. W. Rep. 434.

81. MORTGAGE—*Deed Absolute—Parol Evidence.*—All facts contemporaneous with the execution of an absolute deed may be proved to show it is a mortgage.—*Darst v. Murphy*, S. C. Ill., Jan. 25, 1887; 9 N. E. Rep. 887.

82. —— *Foreclosure— Setting Aside—Delay—Description.*—After final decree it is too late to move to set aside for irregularities in sale unless excuse for such delay. Instance, where description by lot and block of recorded plat prevailed over bounds, courses and distances.—*Cole v. Yorks*, S. C. Minn., Feb. 2, 1887; 31 N. W. Rep. 353.

83. —— *Homestead — Two Mortgages—Husband and Wife.*—A party gave two incumbrances, each including two lots, of which one was his homestead. In the second he selected one lot, on which he resided, as his homestead. His wife did not sign the second mortgage. Upon foreclosure of first mortgage, second mortgagee cannot insist that homestead be sold first.—*Armitage v. Davenport*, S. C. Mich., Jan. 20, 1887; 31 N. W. Rep. 408.

84. MUNICIPAL CORPORATIONS—*Sodding Streets—Assessments — Commissions, Appointment of — Ordinance—One Subject—Assessment, Notice of.*—Grading, draining and sodding a street are one improvement and may be in one ordinance. Sodding is included in the power to improve streets. Commissioners, to assess benefits, may be appointed at probate term of county court. Where assessors are required to notify by mail each owner, whose name and place of residence is known to them, an affidavit by one them that he had notified each owner, whose name and place of residence were known to him, is insufficient.—*Murphy v. Peoria*, S. C. Ill., Jan. 25, 1887; 9 N. E. Rep. 895.

85. —— *Street Improvements—Damages—Setting Aside Judgment.*—New York laws provide for assessment of damages by the assessors in New York city for change of grade of streets and for delivery of bonds therefor. This remedy is exclusive, and the city cannot be held liable for damages, nor for breach of duty by assessors. The only remedy is by *certiorari* or other direct proceeding.—*Heiser v. New York*, N. Y. Ct. App., Jan. 18, 1887; 9 N. E. Rep. 866.

86. —— *Water-works — Pipes — Special Assessments.*—A municipality has discretionary power to build water-works and lay pipes, provided the assessment is imposed according to frontage. When the power has been once exercised, a new scheme relative thereto is an abuse of power.—*Warren v. Chicago*, S. C. Ill., Jan. 25, 1887; 9 N. E. Rep. 883.

87. NEGLIGENCE—*Contributory—Knowledge of Defects—Reasonable Safety—Excuse.*—In action for injury sustained on highway, plaintiff may show its condition and guards needed for protection; his knowledge of its defects is not conclusive of his negligence, but a question for the jury; the necessity for his going to a certain place does not concern the question of negligence in crossing. A witness cannot be asked whether he considers this to be a safe road or not; that is for the jury.—*Harris v. Clinton*, S. C. Mich., Jan. 20, 1887; 31 N. W. Rep. 425.

88. —— *Practice—Jury—Ordering Verdict.*—Negligence is a question for the jury. But the court will order a verdict in proper cases. A State statute forbidding judges to express opinions on facts is disregarded by federal courts. Federal courts will not submit questions to juries merely because *some* evidence has been submitted.—*Hathaway v. East Tennessee, etc. R. Co.*, U. S. C. C., Ga., October Term, 1886; 29 Fed. Rep. 489.

89. OATH—*Mechanic's Lien—Officer and Attorney.*—The oath of a petitioner for a mechanic's lien, made before a justice of the peace, who is petitioner's attorney, is sufficient.—*McDonald v. Willis*, S. J. C. Mass., Jan. 24, 1887; 9 N. E. Rep. 835.

90. PATENTS—*Defective Claim—Re-Issue—Laches.*—A patent in which a mistake has been made cannot be corrected by re-issue after three years have elapsed. A re-issue introducing new matter is void.—*Ines v. Sargent*, U. S. S. C., Jan. 10, 1887; 7 S. C. Rep. 436.

91. —— *Infringement.*—Patent No. 177,334 hydrocarbon stove, no infringment by defendant.—*Sharp v. Reissuer*, U. S. S. C., Jan. 10, 1887; 7 S. C. Rep. 427.

92. —— —— *Delay—Notice.*—Patent No. 98,505 for spring-beds declared valid. One whose patent has been infringed while his right was in the hands of his assignee in bankruptcy who did not protect, may, in equity after re-acquiring his right, maintain an action against the infringer.—*Kettle v. Hall*, U. S. C. C., N. Y., Jan. 3, 1887; 29 Fed. Rep. 508.

93. —— —— *Re-issue.*—Patents 68,502, 69,176, 69,189, for shade-rollers and re-issues, adjudicated. No infriugement by defendant.—*Hartshorn v. Saginaw, etc. Co.*, U. S. S. C., Jan. 10, 1887; 7 S. C. Rep. 421.

94. PHYSICIAN—*Subsequent Visits—Corporation—Agent.*—A physician called into a case is bound, unless sooner discharged by competent authority, to continue his attentions as long as they are needed by his patient, and can recover for his services accordingly. A corporation is not bound to pay for medical services to its servant wounded in a private brawl, although the physician was summoned by its agent and general manager.—*Dale v. Donaldson, etc. Co.*, S. C. Ark., 2 S. W. Rep. 703.

95. PLEADING — *Demurrer—Conclusion of Facts Waste—Reversioner.*—A conclusion of fact is sufficient against a demurrer. A reversioner may maintain waste against assignee of life estate under Minnesota law.—*Curtiss v. Livingston*, S. C. Minn., Feb. 2, 1887; 31 N. W. Rep. 357.

96. —— *Reply — Sufficiency.*— A reply must be good as to the entire answer to which it is addressed.—*Silvers v. Canady*, S. C. Ind., Jan. 12, 1887; 9 N. E. Rep. 904.

97. PRACTICE—*Appeal—Judgment—Stipulation.*—Where plaintiff stipulates that if order of general term, reversing judgment of special term in his favor, is affirmed, judgment absolute shall go against him, and the order is partly affirmed and partly reversed, judgment absolute will go against him.—*Conklin v. Snider*, N. Y. Ct. App. Jan. 18, 1887; 9 N. E. Rep. 880.

98. —— *Bill of Exception Appeal — Several Defendants.*— When a bill exceptions is procured, to settled by one defendant on trial of issues against him, the other defendants cannot rely upon it on their appeal.—*Frawley v. Hoolverter*, S. C. Minn., Feb. 2, 1887; 31 N. W. Rep. 357.

99. —— *Drains — Assessments — Complaints.*— Follows *Kennedy v. State, ante*, 778. *Whittaker v. State*, S. C. Ind., Jan. 13, 1887; 9 N. E. Rep. 916.

100. —— *Instructions—Defective Sidewalks.*— An instruction telling jury the elements of damage, which should be considered by them in the event of finding the city guilty of negligence, is not objectionable if an instruction has been given showing the care the plaintiff must have been exercised to entitle him to recover.—*Village of Sheridan v. Hibbard*, S. C. Ill., Jan. 25, 1887; 9 N. E. Rep. 901.

101. ——*New—Trial—Evidence—Contract by Letters.*—Where issue is whether defendant had accepted a machine absolutely, or whether he was bound to pay the price under the circumstances of the case, all the letters bearing on the subject should be produced, and the court should not take the case from jury and give judgment for plaintiff on letters showing only part of the contract.—*Gurney v. Collins*, S. C. Mich., Jan. 20, 1887; 31 N. W. Rep. 429.

102. PRINCIPAL AND AGENT — *Liability—Election by Creditor—Harmless Error in Trial.*—The fact of agency must be known to creditor at the time to estop him by his election as between principal and agent. It is immaterial whether court erroneously rules that requests were made at the wrong time, if it was improper to grant them at any time.—*Gardner* v. *Peaslee*, S. J. C. Mass., Jan. 10, 1887; 9 N. E. Rep. 833.

103. PROCESS—*Service of, Outside of the State—Corporation.*—The Virginia statute authorizing service of process to be made on defendants outside the State applies only to natural persons and not to corporations or corporation officers as such.—*Dillard v. Central etc. Co.*, Va. Ct. App., Jan. 13, 1887; 1 S. E. Rep. 124.

104. PURCHASER—*For Value.*—One who pays a note on which he is an indorser, in consideration of a conveyance of land, is a purchaser for value.—*Harold v. Owen*, S. C. Mich., Jan. 20, 1887; 31 N. W. Rep. 420.

105. RAILROADS — *Killing Stock.* — In an action against a railroad for killing stock, the question is relative to the conditon of the road, where the animal got on the track, and not where it was killed. This court will not decide an appeal on the latter theory, merely because the case was so tried.—*Ind., B. & W. R. Co. v. Quick*, S. C. Ind., Jan. 26, 1887; 9 N. E. Rep. 925.

106. RELIGION — *Churches — Separate Churches—One Board of Trustees.*—Two congregations cannot be held to be one church, which, having the same pastor, and the same board of trustees, in all other respects conduct their church affairs and secular matters as separate and several churches usually do.—*Everson v. Ellingson*, S. C. Wis. Jan. 11, 1887; 31 N. W. Rep. 342.

107. REMOVAL OF CAUSES.—To remove a cause, the citizenship of the parties must be different when the removal is sought as well as when the suit was begun in the State court.—*Schnadig v. Flescher*, U. S. C. C., Col., Jan. 3, 1887; 29 Fed. Rep. 465.

108. —— The decision by the State court of a demurrer to a bill in equity is not such a final decree as will preclude the removal of the cause, the rule of the State court being that demurrers are heard at the first term and the second is the trial term.—*Howe v. Dillon*, U. S. C. C., Ga., Nov. 30, 1887; 29 Fed. Rep. 465.

109. REPLEVIN—*Election to Take Value—Damages—Notes—Payment—Intent.*—Where in replevin, defendant elects to take the value of the property, his damages are its value at date of replevin and interest thereafter, where in replevin for property not paid for, it appeared notes were given, and an agreement made in writing to pay the same in shingles, which defendant claimed plaintiff denied were delivered, the question, whether the parties intended the shingles to be accepted on the contract should be left to the jury.—*Just v. Porter*, S. C. Mich., Jan. 27, 1887; 31 N. W. Rep. 444.

110. TAXATION — *Abatement—Injunction.*— Where taxes wrongfully assessed, an application for its abatement is the proper remedy. This court cannot enjoin the assessment or collection of taxes.—*Flax Pond Water Co. v. City of Lynn*, S. J. C. Mass., Jan. 24, 1887; 9 N. E. Rep. 836.

111. ——— *Deed—Tax Sale—Limitation.*— In Wisconsin (Laws 1880, ch. 309, § 3), one year's limitation cures defects in tax deed which relate to the assessment, but not those affecting the notice and procedure. What is the proper notice declared.—*Morris v. Mississippi, etc. Co.*, S. C. Wis., Feb. 1, 1887; 31 N. W. Rep. 483.

112. TAXATION — *Mercantile Tax — Constitutional Law.*—The city of Pittsburg can collect a mercantile tax, and the statute which confer that power are not repealed by art. 9, § 1, of the constitution of 1874, which does not execute itself and has not been carried into effect by legislation.—*Keystone Bridge Co.'s Appeal*, S. C. Penn., Jan. 3, 1887; 7 Atl. Rep. 579.

113. ——— *Partnership—Payment Under Protest—Excessive Tax—Other Grounds for Relief.*—Where a partnership owns property in a different township from their place of business and residence, which is assessed against one, a payment of the tax thereon at demand of the treasurer is involuntary, and they may sue to recover it. When they claim that tax is illegal because laid on more property than they own, they may rely for relief on any other ground.—*Babcock v. Beaver Creek*, S. C. Mich., Jan. 27, 1887; 31 N. W. Rep. 423.

114. ——— *Sale—Auditor's Certificate—When Executed.*—The Minnesota law contemplates the execution of the auditor's certifiate of tax sale within a reasonable time thereafter. Such certificate made many years thereafter is invalid.—*Stewart v. Minn. & St. L.R. Co.*, S. C. Minn., Jan. 31, 1887; N. W. Rep. 351.

115. TELEGRAPH COMPANY — *Failure to Transmit Message—Indiana Act.*—The act of April 8, 1885, prescribing duties of telegraph companies applies to acts or omissions caused by partiality or bad faith, and not to those caused by negligence merely.—*West. U. T. Co. v. Swain*, S. C. Ind., Jan. 28, 1887; 9 N. E. Rep. 927.

116. TENANTS IN COMMON.—One of two tenants in common who is in possession of the property is not liable to his co-tenant for rent, unless he has held the property to his own exclusive use and excluded his co-tenant from an equal participation in the use of it.—*Hamby v. Wall*, S. C. Ark., Jan. 1, 1887; 2 S. W. Rep. 705.

117. TENDER—*Offer of Judgment — Presumption—Justice of the Peace.*—In a justice's court an offer of judgment and tender is made and refused, there is no presumption on appeal in the district court that the offer was not written. Such an offer need not be renewed in the appellate court.—*Underhill v. Shea*, S. C. Neb., Feb. 2, 1887; 31 N. W. Rep. 510.

118. TRUST—*Land Held as Security for Advances—Equitable Title — Quit-Claim Deed.*— Parties holding land under quit-claim deed from one who held the title only as security for advances made to the equitable owner to pay purchase money and taxes, cannot sustain a claim to the title as against the equitable owner who has held possession throughout the transactions.—*Lamoreaux v. Meyers*, S. C. Wis., Jan. 11, 1887; 31 N. W. Rep. 331.

119. ——— *Wills—Devises — Shelly's Case.*— The rule in Shelly's case is adopted in Indiana, and a devise will be so construed, unless it clearly appears the word "heirs" was used in a different sense. When a fee simple is devised, a condition in restraint of alienation is void. Estates tail are, in Indiana, estates in fee simple. Where a devise gives no power of control or disposition to the trustee, it vests directly in the beneficiary.—*Allen v. Craft*, S. C. Ind., Jan. 13, 1887; 9 N. E. Rep. 919.

120. USURY—*Foreign Contract—Defense.*—Though interest in contract greater than allowed here, yet court will not declare it usurious where made, no such defense having been interposed. —*Reiff v. Bakken*, S. C. Minn., Jan. 6, 1887; 31 N. W. Rep. 348.

121. VENDOR'S LIEN.—To enforce a vendor's lien, the contract and all its concomitant circumstances must be clearly proved.—*Dunton v. Outhouse*, S. C. Mich., Jan. 20, 1887; 31 N. W. Rep. 411.

122. VENUE—*Change—Justice.*—In Nebraska, the rule is that, when a case has been transferred by change of venue to a justice, who is incompetent by reason of bias or prejudice, the proper course is to send back the case to the justice from whom it came.—*Hitchcock v. McKenster*, S. C. Nebraska, Feb. 2, 1887; 31 N. W. Rep 507.

123. VENUE—*Change of—Criminal Law.*—In Mississippi, upon a change of venue in a criminal case, the accused must be tried upon a certified copy of the original indictment, and such certified copy must contain all the indorsements that were on the original.—*Williamson v. State*, S. C. Miss., Jan. 31, 1887; 1 South. Rep. 171.

124. ——— ——— *Jurisdiction.*—In South Carolina (code § 147) if a suit is brought in a wrong county, the court can order a change of venue to another county and a refusal to do so and a dismissal of the suit is erroneous.—*Geiser, etc. Co. v. Sanders*, S. C., S. Car., Feb. 4, 1887; 1 S. E. Rep. 159.

125. VERDICT—*Setting Aside.*—A verdict will only be set aside when it appears that the weight of evidence is clearly against it.—*Miles v. Saunders*, Ky. Ct. App., Jan. 25, 1887; 2 S. W. Rep. 676.

126. WARRANTY—*Breach — Evidence — Notice.*— To sustain an action for breach of warranty, defendants must have had previous notice of the judgment under which the plaintiff was ejected.—

Hines v. Jenkins, S. C. Mich., Jan. 20, 1887; 31 N. W. Rep. 432.

127. —— *Sale—Action for Price—Evidence.* — A printed warranty with warrantor's name printed thereon, delivered by his agent to one who with knowledge of agent relied on it, is binding on warrantor, even though it stated it must be signed by agent to make it binding and this was not done. Defendant affirmed and plaintiff denied the execution and delivery of the warranty. *Held*, sufficient evidence to permit introduction of the printed warranty.—*First Nat. Bk. v. Erickson*, S. C. Neb., Jan. 6, 1887; 31 N. W. Rep. 387.

128. WAYS—*Assessment Statute.*—Under § 1275, Rev. Stat. Wisconsin, one whose land is entirely surrounded by the lands of other persons, and who seeks an outlet to the highway, mustpay the assessment made against him for the value of his road within ten days after the decision of the supervisors in favor of his application.—*State ex rel. v. Supervisors, etc.*, S. C. Wis., Feb. 1, 1887; 31 N. W. Rep. 482.

129. WAYS—*Certiorari—Delay.*—Where it appears that, upon a petition to re-examine the proceedings of township officers in the matter of a road, that there has been unreasonable delay in the application to reconsider, the court will not interfere because of technical errors.—*Carpenter v. Strobel*, S. C. Mich., Jan. 20, 1887; 31 N. W. Rep. 460.

130. WILLS — *Advancements — Child — Wife—Evidence—Incompentcy.*—A gift to a child will not be considered an advancement, when the father intended it not to be such. A gift to a wife is not affected by the New York law about advancements. An objection to evidence for incompetency comes too late after the evidence is given, and is premature as to any further evidence that may be given; it must be against the question.—*Le Coulteux v. Morgan*, N. Y. Ct. App., Jan. 18, 1887; 9 N. E. Rep. 861.

131. —— *Devise — Appointment — Remainder — Waste—Right of Heir of Devisee.*—A testator devised an estate to two persons with power in each to appoint to respective remainders, and appointed both devisees and another executors, and they all committed waste. One of the devisees (testator's son) died without executing his power of appointment, but by will devised his estate to his son. It was held that the son of the original testator took as heir of his father, and not, *quoad* the remainder, —under the will, and that his devisee, succeeding to the rights of his father, could not hold the executors of the original will liable for waste, because his father had been one of them and had participated in the waste.—*Herbert v. Herbert*, Ky. Ct. App., Jan. 29, 1887; 2 S. W. Rep. 682.

132. —— *Dower—Election.*—A widow is not put to her election whether to take her dower or under the will, unless there is a clear incompatibility between the two.—*Konalinka v. Schlegel*, N. Y. Ct. App., Jan. 18, 1887; 9 N. E. Rep. 868.

133. —— *Income, Right to Alienate — Fraud — Findings.*—Where beneficiary given unrestricted interest in income of a fund, he may alienate it, wholly or in part, before the time of payment. Where fraud is in issue, the special finding must find fraud as a fact and not merely badges of fraud. —*Caldwell v. Boyd*, S. C. Ind., Jan. 15, 1887; 9 N. E. Rep. 912.

134. —— *Power—Deed.*—Where a will devises an estate with power of disposition, the deed of the devisee will be referred to the power and will carry the fee.—*Silvers v. Canady*, S. C. Ind., Jan. 12, 1887; 9 N. E. Rep. 904.

135. WILL *Remainder — Children as a Class.*—In Georgia, it is the rule that, in construing a will, words of survivorship refer to the death of the testator. If a life estate be granted, with remainder to children, and the representatives of deceased children, a child living at the death of testator, but dead when the life estate fell in, was held to take a vested remainder.—*Vason v. Estes*, S. C. Ga., Jan. 18, 1887; 1 S. E. Rep. 163.

136. WITNESS— *Agent of Deceased — Transaction with Deceased Person.*— A magistrate who procures a grantor to re-acknowledge a deed not to cure a mistake is not the agent of the grantee in such a sense as would make the testimony of the grantor admissible under the Virginia statute making exceptions to the rule excluding testimony of parties to actions relating to transactions with deceased parties.—*Booth v. McJilton*, Va. Ct. App., Jan. 27, 1887; 1 S. E. Rep. 137.

137. —— *Competency of—Evidence.*—Objection to deposition on the ground of the competency of the witness will not avail if no objection was made when the deposition was taken and he was then cross-examined. Deposition admissible in the original suit is admissable upon a cross-bill.—*Smith v. Proffitt*, S. C. App. Va., Jan. 27, 1887, 1 S. E. Rep. 67.

138. —— *Party Deceased—Party Interested—Declarations.*—In a suit following trust funds, evidence of deceased husband of a beneficiary relative to statements of the deceased trustee relative to the funds, not offered in interest of deceased husband, is admissible.—*Conklin v. Snider*, N. Y. Ct. App., Jan. 18, 1887; 9 N. E. Rep. 880.

139. —— *Testimony of, as to Transactions with Deceased Persons.*—Construction of the constitution of Arkansas (1874 schedule § 2), concerning the testimony of parties as to statements on acts of a deceased person whose executor or administrator is the opposite party.—*Parke v. Locke*, S. C. Ark., Jan. 1887; 2 S. W. Rep. 696.

140. —— *Deceased Person.*—In Florida, a party cannot testify for himself about transactions with a deceased person, unless the assignee of such decedent who is interested in the matter and still survives is examined as a witness for himself, touching the same transaction.—*Harris v. Bank of Jacksonville*, S. C. Fla., Sept. 8, 1886; 1 South. Rep. 140.

141. —— *Transaction with Deceased Person—Husband and Wife.*—A *feme covert* is not a competent witness on her own behalf against the estate of a deceased person, concerning a transaction with that person; but her husband, although he joined her in that transaction, is a competent witness on her behalf under the code of Mississippi, § 1602.—*Ellis v. Alford*, S. C. Miss., Nov. 8, 1886, 1 South. Rep. 155.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES.

Query No. 12. Under United States statutes national banks have power to discount and negotiate promissory notes, etc.; to buy and sell exchange, coin, etc. Would like to be informed whether a national bank can buy a promissory note, and what the difference is, in law, between buying and discounting a note. Will you or some of your JOURNAL correspondents please answer, with reference to authority.

E. P. N.

QUERIES ANSWERED.

Query No. 4. [23 Cent. L. J. 46.] A and P, lumber and material men, contract with D to furnish material to fence a certain lot in town (owned by D). The material was furnished, as per contract, and the fence erected; but before paying for the material, and within ten days after the improvements are finished, D (who is insolvent) secretly conveyed the property to E, who is an innocent purchaser for value. Will the fact that E, as an innocent purchaser, defeat the right of A and B to a lien, as material men, in Missouri, under § 3172, Rev. Stat. Mo.? See also §§ 3174, 3178 Rev. Stat. Mo.

C. B. A.

Answer. If A and B, having made the improvements stated in the query, shall have, within six months after the completion of the work, filed their account with the clerk of the circuit court, in accordance with Rev. Stat. Mo. (1879) § 3176, they will have a lien upon the property for such improvement superior to the claim of any subsequent purchaser for value; because, under § 3178, they have a lien superior to all subsequent incumbrances, and in this point of view a subsequent conveyance is a subsequent incumbrance. The mechanic's lien relates back to the commencement of the work. Reilly v. Hudson, 62 Mo. 383.

C. A. B.

RECENT PUBLICATIONS.

AN INDEX-DIGEST of the Reports of Cases Decided in the Courts of Ohio, embracing the Supreme, Circuit, Common Pleas and Superior Court Decisions to May, 1886. By John Welch, late Judge of the Supreme Court of Ohio. Cincinnati: Robert Clarke & Co. 1887.

This is a local work which will undoubtedly prove of very great value to the profession in Ohio. When properly prepared, an index-digest, embracing all the reports of a State, is a work of great use; indeed, indispensable to the practitioners of that State, but if imperfect or defective, is misleading, and of little value. The work before us is evidently one of the best of its class, and, besides internal evidence of its merit, bears in the name of its author the strongest of recommendations. Judge Welch, by whom it was prepared, was for many years one of the judges of the Supreme Court of Ohio, and deservedly bore the reputation of being one of the ablest lawyers that ever sat upon the bench of that court. The work is prepared with great care, and evinces the remarkable powers of condensation possessed by its author. We heartily commend it to the profession in Ohio, as well as to all others who have frequent occasion to refer to Ohio decisions.

AN EXPOSITION OF THE PRACTICE Relative to the Right to Begin and Reply in Trials by Jury, and Other Proceedings, Discussions of Law, etc. By William M. Best, A. M., LL. B., author of "Principles of the Law of Evidence," etc. With Annotations by J. J. Crandall, Esq., of the Camden (N. J.) Bar. Cincinnati: Robert Clarke & Co. 1886.

This is a rather small book (264 pages) on a subject of much importance to the active practitioner. The English original is the work of a gentleman of high reputation in the profession, and the American editor has added a large body of very judicious annotations. These bring the subject across the Atlantic and down to date. The work has the singular advantages of being practically without competion; for, so far as we are advised, there is no other treatise on the specific subject, and the works on evidence and practice treat it very sparingly. It is well worthy the attention of all practitioners. We regret to add that the work is gotten out in a style decidedly unworthy the reputation deservedly enjoyed by its publishers.

JETSAM AND FLOTSAM.

THE JUDGE NEEDED THE MONEY.—I have just heard the following good story of Chief Justice Bleckley. All who know Judge Bleckley and recall his long wavy hair and beard will appreciate the story. Judge Bleckley was on his way to the supreme court one morning, when he was accosted by a little street gamin, with an exceedingly dirty face, with the customary "shine sir?"

He was quite importunate, and the judge, being impressed with the oppressive untidiness of the boy's face, said: "I don't want a shine, but if you will go wash your face I'll give you a dime."

"All right, sir."

"Well, let me see you do it."

The boy went to an artesian hydrant and made his ablution. Returning, he held out his hand for the dime.

The judge said: "Well, sir, you have earned your money; here it is."

The boy said: "I don't want your money, old fellow; you take it and have your hair cut." Saying which he scampered off.—*Augusta (Ga.) Chronicle.*

IN a recent case, the Kentucky Court of Appeals, in deciding the claim of a woman to be licensedas a pharmacist, observed: "It is gratifying to see American women coming to the front in these honorable pursuits. The history of civilization in every country shows that it has merely kept pace with the advancement of its women. The Brahmin's wife was burnt with his dead body. The Mahomedan woman is a slave for the man. The husband of the English wife formerly had a right to chastise her; and by a fiction of law, her legal identity was completely absorbed in him. We are leaving mockeries behind us, and it is gratifying that these matters are now a long way in the past."—*Montreal Legal News.*